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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

**Defence Application for Allocation of Time to Present *Viva Voce* Witnesses at 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

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirimi Muthaura

Karim A. A. Khan QC, Essa M. Faal,
Kennedy Ogetto & Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and Gillian Higgins

Counsel for Mohammed Hussein Ali

Evans Monari, John Philpot and
Gershom Otachi Bw'Omanwa

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

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Counsel Support Section

Deputy Registrar

Didier Prieria

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Pursuant to the Single Judge's Order¹ ("Order") of 10 August 2011, the Defence for Ambassador Francis Kirimi Muthaura ("Defence") submits this application requesting the Single Judge to allocate 10 hours to the Defence for the purposes of presenting *viva voce* evidence at the confirmation of charges hearing ("confirmation hearing"). The Defence makes this application fully cognisant of the principles underlying the Single Judge's Order – namely the limited scope and purpose of the confirmation hearing and the right of the defence to independently devise its strategy – and respectfully submits that the present request provides the most reasonable and equitable means to "properly balance the different competing interests involved."² Indeed, the Defence submits that the requested 10 hours are reasonable and proportionate in the light of the magnitude of the present case and the seriousness of the charges.

2. The Defence is also cognisant of the Single Judge's admonition that reducing the number of *viva voce* witnesses does not interfere with the rights of the Defence to rely on written and other forms of evidence. In this regard, the Defence notifies the Single Judge that it will be relying significantly on witness statements, publicly available reports, and other documentary and video evidence in presenting its case at the confirmation hearing. In fact, the Defence anticipates tendering approximately 40 written witness statements, in comparison to the maximum 3 or 4 *viva voce* witnesses that the Defence now seeks to call. The limited and selective presentation of *viva voce* testimony, within any time to be allocated by the Single Judge, will serve to provide the Chamber with the best evidence available regarding the facts and legal issues that Counsel have determined are essential for the defence case. Allocating a specified time period to the Defence *in lieu* of capping the number of *viva voce*

¹ 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, ICC-01/09-02/11-226.

² *Ibid.*, para. 24.

witnesses ensures judicial economy, whilst at the same time preserving the limited scope of the confirmation hearing. That said, the Defence acknowledges and regrets that in its initial submission³ on this issue it did not make request for the allocation of time in this regard.

II. BACKGROUND

3. On 6 April 2011, the Single Judge issued her “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”,⁴ which sets out the principles governing disclosure in this case.
4. At the initial appearance on 8 April 2011, the Pre-Trial Chamber (“Chamber”) scheduled the confirmation hearing to begin on 21 September 2011.
5. On 20 July 2011, the Single Judge issued the “Decision Requesting the Parties to Submit Information for the Preparation for the Confirmation Hearing”, ordering the parties to indicate by 5 August 2011, whether they intended to call *viva voce* witnesses at the confirmation hearing, and if so to further inform the Chamber of the subject-matter and scope of the testimony of the witness.⁵
6. On 5 August 2011, the Defence, as well as the defence teams of Uhuru Muigai Kenyatta and Mohammed Hussein Ali, submitted their respective filings⁶ in accordance with the Single Judge’s 20 July 2011 Decision. In these submissions the three defence teams notified the single judge of their respective intentions to call *viva voce* witnesses, and included additional information regarding the scope and purpose of the testimony of their proposed *viva voce* witnesses in confidential and *ex parte* annexes to their filings. In the Defence’s confidential

⁴ ICC-01/09-02/11-48.

⁵ ICC-01/09-02/11-181.

⁶ Submission by Defence Team of Ambassador Francis K. Muthaura in Preparation for the Commencement of the Confirmation Hearing, ICC-01/09-02/11-215 (“5 August 2011 Submission”); Defence Submission on Behalf of Uhuru Kenyatta on the Nature and Scope of the Confirmation Hearing and the Calling of Live Evidence, ICC-01/09-02/11-216; Defence Submissions on “Decision Requesting the Parties to Submit Information for the Confirmation of Charges Hearing” (ICC-01/09-02/11-181), ICC-01/09-02/11-219.

and *ex parte* annex,⁷ it set out, for each witness, an estimate for the amount of time required for the presentation of the proposed testimony.

7. On 9 August 2011, the Defence submitted the “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” (“Request for Extension of Time”),⁸ in which it requested the Chamber to grant an extension of time in order to include one additional witness to its list of proposed *viva voce* witnesses submitted on 5 August.
8. On 10 August 2011, the Single Judge issued her Order, granting the Defence’s Request for Extension of Time and ordering each of the three defence teams to reduce to a maximum of two their intended *viva voce* witnesses for the confirmation hearing, and submit by no later than 15 August 2011 an amended list of *viva voce* witnesses.

III. DEFENCE SUBMISSIONS

9. The Defence is cognisant of the Single Judge’s holding that irrespective of any limitation that must be imposed on the calling of *viva voce* testimony at the confirmation hearing, the defence may rely “upon all written witnesses’ statements that are of significance for their respective case subject to the Chamber’s determination as to their relevance or admissibility [...]”⁹ Indeed, the Defence shall rely significantly on witness statements (approximately 40), public reports and other documentary and video evidence in support of its case, which evidence it will disclose to the Chamber, the Prosecution and the other participants at the appropriate time pursuant to Rule 121(6) of the Rules of Procedure and Evidence. As stated, the *viva voce* witnesses to be called by the Defence will serve to provide the best available evidence to the Chamber

⁷ ICC-01/09-02/11-215-Conf-Exp-Anx.

⁸ ICC-01/09-02/11-223 (“9 August 2011 Submission”).

⁹ Order, para. 27 (emphasis added); see also para. 12.

regarding the facts and legal issues that Counsel have determined are essential for the defence case.

10. Further, the Defence fully accepts, as the Single Judge sets out – citing the Appeals Chamber, that the applicable evidentiary regime differs at the pre-trial and trial stages and that the orality principle is “more relaxed” at the pre-trial than trial phase as evidenced by Article 61(5) of the Statute.¹⁰ The Defence recalls that Pre-Trial Chamber I (“PTC 1”) in the *Abu Garda* case concluded that “the Prosecution’s right to rely on summary evidence in accordance with article 61(5) of the Statute must be balanced with the right of the Defence, in accordance with article 61(6) of the Statute, to challenge the evidence presented by the Prosecution.”¹¹

11. This finding by PTC 1 in the *Abu Garda* case is significant in that, under the general principles of evidentiary evaluation regardless of the stage of the proceedings, *viva voce* testimony is accorded the greatest probative value given that it can be tested in the courtroom by all parties and participants, as well as the Chamber. The Defence submits that the Single Judge, when “balanc[ing] the different competing interests involved”¹², should apply the measure that is the least restrictive in curtailing the utility and flexibility of this most powerful tool in the Defence’s evidentiary toolbox. This is, in the Defence’s respectful submission, a time allocation for the calling of *viva voce* witnesses, within which “qualified and experienced counsel” can determine how best to advance the Defence strategy.

12. The present request finds support in human rights law, which informs the application of the Statute and Rules. That law establishes that it is not

¹⁰ *Ibid.*, para. 18. Article 61(5) states, in relevant part: “The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.”

¹¹ Public Redacted Version of Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 50.

¹² Order, para. 24.

sufficient to simply acknowledge the existence of a right. Instead, human rights law principles require that a right is rendered practical and effective in order to be meaningful. According to the jurisprudence of the European Court of Human Rights – which the Court should consider in interpreting the Statute pursuant to Article 21(3) of the Statute – in order for a suspect to exercise the right to challenge evidence against him/her or present evidence, “the [European] Convention [on Human Rights] [ECHR] must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory.” That Court found that this is particularly the case for “the rights of the defence in the view of the prominent place held in democratic society by the right to a fair trial, from which they derive.”¹³

13. The Defence also notes, with appreciation, the holding that “it is not the Single Judge's intent to interfere with the strategy of the Defence”¹⁴ and that it “does not fall within [the Single Judge's] responsibility and power to identify those witnesses who should be chosen among those previously inserted in the Suspects' list of witnesses [...]”¹⁵ Instead, it is for the “qualified and experienced counsels” representing the suspects to make this determination.¹⁶

14. It is the Defence's considered assessment that the balancing of the above cited principles expressed by the Single Judge and echoed in human rights law, with the principles of expeditiousness,¹⁷ judicial economy,¹⁸ and the limited scope of the confirmation hearing,¹⁹ also noted by the Single Judge, stated position is best met by allocating to each defence team a specified amount of time for the presentation of *viva voce* witnesses *in lieu* of a cap on the number of witnesses. Under such a proposal the Single Judge would indeed take the

¹³ *Artico v. Italy*, Judgement, European Court Human Rights, 3 May 1980, para. 33.

¹⁴ *Ibid.*, para. 15.

¹⁵ *Ibid.*, para. 25.

¹⁶ *Ibid.*, para. 26.

¹⁷ *Ibid.*, para. 16.

¹⁸ *Ibid.*, para. 11.

¹⁹ *Ibid.*, para. 11.

role of a non-intervening judicial administrator, as it would be up to Counsel – *who are of course best placed to determine which viva voce witnesses should address which legal issues and for what amount of time* – to select the *viva voce* witnesses to call within the time allocated by the Single Judge to each defence team. Such an order setting and strictly enforcing a reasonable and appropriate time allocation for *viva voce* testimony, ensures respect for the principles of judicial economy, and expeditiousness of the proceedings while at the same time preserving the limited scope of the confirmation hearing.

15. The Defence notes that the Order does not circumscribe the amount of time the maximum two *viva voce* witnesses currently allocated to each defence team may testify, nor did the Order take issue with the time estimates provided by the Defence for the testimony of its proposed *viva voce* witnesses.²⁰ The Defence considers that reference to the *Abu Garda* confirmation hearing will assist in this respect. At the *Abu Garda* confirmation hearing, the Prosecution called a total of three witnesses who testified for more than 21 hours.²¹ In the present case, as noted above, the Defence seeks to examine a maximum of 3 to 4 *viva voce* witnesses within no more than 10 hours. Accordingly, a strictly enforced time allocation *in lieu* of capping the number of witnesses is, in the Defence's respectful submission, the most efficient and equitable manner to achieve the judicial economy sought by the Single Judge while "properly balanc[ing] the different competing interests involved"²².

16. The Defence request is also supported by lessons learnt at the *ad hoc* tribunals. Experience of international tribunals has shown that limiting the number of *viva voce* witnesses may not automatically expedite the proceedings or avoid undue delays, nor does it guarantee that the equal rights of suspects are

²⁰ See ICC-01/09-02/11-215-Conf-Exp-Anx.

²¹ See *Prosecutor v. Abu Garda*, Confirmation Hearing, Transcript of 21 October 2009 (ICC-02/05-02/09-T-14-CONF-ENG), Transcript of 22 October 2009 (ICC-02/05-02/09-T-15-CONF-ENG), Transcript of 23 October 2009 (ICC-02/05-02/09-T-16-CONF-ENG) and Transcript of 26 October 2009 (ICC-02/05-02/09-T-17-CONF-ENG).

²² Order, para. 24.

protected. A review of tribunal case law and transcripts disclose that the testimony of a single key witness may extend for days, weeks or even months, thus confirming the position advanced by the Defence herein.²³ Further, the Defence does not dispute that “live testimony has a significant impact on the organization of the confirmation of charges hearing and, more generally, on the conduct of the proceedings.”²⁴ However, in “making [this] delicate balance of competing interests” between the rights of a suspect to conduct his defence at confirmation and the expeditiousness of the proceedings,²⁵ the Defence respectfully submits that the rights of the Defence to present evidence garners slightly more weight than the expeditiousness of the proceedings, as the former is *lex specialis*. Indeed, Trechsel, applied the same reasoning regarding two seemingly conflicting provisions of the ECHR – namely Article 6(1) (trial “within reasonable time”) and Article 6(3)(b) which grants adequate time to conduct one’s defence. Trechsel states: “The general guarantee calls for speed, the specific one protects against speed.” He concludes that there is no contradiction between the two provision because Article 6(3)(b) prevails, as *lex specialis*.²⁶

17. The Defence notes in this context that the request for 10 hours is reasonable and proportionate. As mentioned above, at the confirmation hearing in *Abu Garda* – a case concerning a single incident and charges of much more limited geographic, temporal and factual scope – the Prosecution called a total of three *viva voce* witnesses who testified over more than 21 hours, which equals four days.²⁷ Well aware that the confirmation proceedings are not a “mini-trial”,

²³ For example, Charles Taylor testified at the Special Court for Sierra Leone in the trial against him between 14 July 2009 and 19 February 2010. Slobodan Praljak testified at the International Criminal Tribunal for the former Yugoslavia in the trial against him between 4 May and 10 September 2009. While the Defence acknowledges that the confirmation hearing is not a ‘mini-trial’, the underlying principle that witnesses may testify for differing lengths of time, particularly when considering the subject matter of their testimony, is an obvious reality.

²⁴ *Ibid.*, para. 18.

²⁵ *Ibid.*, para. 15.

²⁶ S. Trechsel, *Human Rights in Criminal Proceedings* (OUP, Oxford 2006) p. 216.

²⁷ See *Prosecutor v. Abu Garda*, Confirmation Hearing, Transcript of 21 October 2009 (ICC-02/05-02/09-T-14-CONF-ENG), Transcript of 22 October 2009 (ICC-02/05-02/09-T-15-CONF-ENG), Transcript of 23 October

the Defence here seeks to call only a core group of 3 to 4 *viva voce* witnesses essential to the Defence case in comparison to the anticipated 40 written witness statements, as well as other wide-ranging documentary evidence it would also introduce into evidence as part of its case.

18. The Defence submits that the requested 10 hours are justified, in fact a moderate proposal, in the light of the magnitude of the case, as well as the seriousness of the charges and their impact on Ambassador Muthaura. Rule 136 (2) provides that in a joint trial “each accused shall be accorded the same right as if such accused were being tried separately.” The Defence acknowledges the right of suspects to an expeditious trial. However, no objections or concerns have been raised by the defences for either Messrs. Kenyatta or Ali in respect to the number of *viva voce* witnesses initially proposed by the Defence to be called at the confirmation hearing.²⁸ The Defence likewise does not object to the number of witnesses initially proposed by the defences for either Messrs. Kenyatta or Ali. As such, deference should be given to the Defence’s request in that it imposes no constraints on the other suspects, given that they have raised no objection to the Defence’s proposal.

19. In the event the Single Judge deems that the 10 hours requested by the Defence will “unduly prejudice” Messrs. Kenyatta and Ali’s right to be tried with undue delay,²⁹ in order to avoid serious prejudice to Ambassador Muthaura in accordance with Rule 136(1), the case against Ambassador Muthaura, must be severed.

20. Based on the above submissions, in the Defence’s respectful submission, and in line with the principles espoused by the Single Judge in her Order, as well

2009 (ICC-02/05-02/09-T-16-CONF-ENG) and Transcript of 26 October 2009 (ICC-02/05-02/09-T-17-CONF-ENG).

²⁸ In its 5 August 2011 Submission, the Defence stated that it intends to call 8 *viva voce* witnesses (ICC-01/09-02/11-219, para. 3) and sought to add an additional witness in its 9 August 2011 Submission ((ICC-01/09-02/11-223)

²⁹ Order, para. 17.

as basic human rights principles, the judicial administrative tool best suited to manage the ‘impact’ of *viva voce* testimony on the confirmation hearing while preserving the fundamental right of a suspect to conduct his Defence, is a strictly enforced time allocation *in lieu* of capping the number of witnesses. This way the Single Judge will ensure the timely and expeditious conduct of the proceedings, whilst ensuring that the Defence presents its case in accordance with its overall strategy.

IV. LEGAL BASIS

21. The Defence submit that the Single Judge possesses the authority to impose time allocations on the defence for the calling of *viva voce* witnesses at the confirmation hearing given Her Honour’s “inherent power to organize the proceedings in such a manner which properly balance the different competing interests involved [...]”,³⁰ and in line with Rule 122(1) of the Rules of Procedure and Evidence.

CONCLUSION AND REQUEST FOR RELIEF

22. For the reasons set out above, the Defence respectfully requests the Single Judge to allocate 10 hours to the Defence for the calling of *viva voce* witnesses at the confirmation of charges hearing *in lieu* of a maximum cap of two witnesses for the Defence.

23. In selecting its three to four *viva voce* witnesses, the Defence shall adhere to the principles set out above and otherwise in the Single Judge’s Order, especially the principle of non-duplication of oral testimony.³¹ Should the Single Judge grant the Defence’s request prior to the expiration of the 15 August deadline imposed by the Order, the Defence shall comply with the deadline.

³⁰ Order, para. 24.

³¹ Ibid., para. 22-23.

Respectfully submitted,



Karim A. A. Khan QC

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 12th Day of August 2011

At Nairobi, Kenya