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No.: ICC-01/09-02/11
Date: 15 August 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single 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 Request for Leave to Appeal “Order 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”**

Source: Defence of General Mohammed Hussein Ali

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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REGISTRY

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Mr. Didier Daniel Preira, Deputy
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Counsel Support Section

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Detention Section

Victims Participation and Reparations

Other

Procedural Background

1. 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”,¹ 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 subject matter and the scope of the proposed testimony of each witness.”²
2. Accordingly, the Defence for General Mohammed Hussein Ali (“Hereinafter, the Defence”) filed its “Submissions on the Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”.³
3. While taking into account the limited scope and nature of the Confirmation Hearing, the importance of upholding the fair trial rights of the Accused and the need to ensure proceedings continue in an expeditious manner, the Defence respectfully requested the Trial Chamber to permit it to call 8 *viva voce* witnesses at the forthcoming Confirmation Hearing.⁴ Moreover, it further outlined the justification and necessity of the proposed testimony in the confidential *ex parte* Annex. Indeed, the Defence has to date been working in the absence of the Document Containing Charges (Hereinafter, “DCC”) and is therefore blind to the specificity of the charges against the Accused.

¹ 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.

² 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.

³ Pre-Trial Chamber II, The Prosecutor v Muthaura et al., “Defence Submissions on the Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”, 5 August 2011, ICC-01/09-02/11-181.

⁴ *Ibid*, paras. 2, 7, 12.

4. On 10 August 2011, the Single Judge issued her “Order 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.”⁵
5. The Single Judge opined that the maximum number of potential witnesses to be called by the respective Defence teams was “manifestly excessive and disproportionate for the purpose of the Confirmation of Charges Hearing” and if the indicated witnesses were permitted to testify orally then the hearing would constitute “a mere anticipation of the trial stage of the case”.⁶ The Single Judge further considered that the equal rights of the three suspects would be “properly respected” if the number of *viva voce* witnesses were to be reduced and reliance be placed on the written statements of other witnesses without the need to call them to testify live before the Chamber.⁷
6. The Single Judge subsequently concluded that by limiting each suspect to two *viva voce* witnesses, the Defence would still be able to “meaningfully exercise its rights provided for by article 61(6) of the Statute.”⁸ The respective Defence teams were ordered to submit by 15 August 2011 an amended list of *viva voce* witnesses, indicating their names and the scope and subject matter of their proposed questioning.⁹
7. The Defence hereby seeks leave to appeal the Pre-Trial Chamber’s Order of 10 August 2011.

Threshold criteria for leave to appeal

8. The Defence files this *Defence Application for Leave to Appeal the Order 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* (“Defence Application”) pursuant

⁵ Pre-Trial Chamber II, *The Prosecutor v Muthaura et al.*, “Order 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”, 10 August 2011, ICC-01/09-02/11.

⁶ ICC-01/09-02/11, para. 13.

⁷ ICC-01/09-02/11, para. 21.

⁸ ICC-01/09-02/11, paras. 24, 28.

⁹ ICC-01/09-02/11, Disposition.

to article 82(1)(d) of the Rome Statute, Rule 155 of the Rules, and Regulation 65 of the Regulations of the Court.

9. This Court has repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned Decision, and that meets the following two cumulative criteria:
 - a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
 - b. It must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁰

Issue of Appeal

10. The Defence seeks leave to appeal the following issue: that the Defence be restricted to calling a maximum of two *viva voce* witnesses for the forthcoming Confirmation of Charges hearing on 21 September 2011, and specifically whether the Single judge erred in restricting the number of *viva voce* witnesses.

Impact on the Fairness of Proceedings

11. The Defence respectfully submits that the decision to restrict the Defence to calling a maximum of two *viva voce* witnesses significantly impacts the fairness of the proceedings, and the ability of the Defence to mount an effective defence against the charges, which still have not been specified in the DCC and remain undisclosed and unknown to the Defence.
12. The Prosecutor has indicated that he does not intend to call live witness at the confirmation hearing, but will rely on documentary evidence.¹¹ This is the Prosecutor's prerogative. However, this decision should not be used as implicit

¹⁰ Pre-Trial Chamber II, *The Prosecutor v Katanga and Chui*, ICC-01/04-01/07-108, Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions, 14 December 2007, p. 3; ICC-01/04-01/07-116, Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, 19 December 2007, p. 4.

¹¹ ICC-01/09-02/11, para. 4.

justification for placing unduly restrictive evidentiary boundaries on the Defence. Simply because the Prosecutor chooses not to rely on live testimony does not mean the Defence should be limited to an unreasonable amount of *viva voce* witnesses.

13. With no restriction on the number of witnesses a party may call, Article 61(6)(iii) of the Statute broadly permits the Defence to present evidence at the Confirmation Hearing. Despite the absence of any statutory limitations in Article 61, the Single Judge has decided that the cumulative number of proposed Defence witnesses was “manifestly excessive” and has limited the Accused to two *viva voce* witnesses.¹²

14. It is respectfully submitted that the current limit of two live witnesses is insufficient and unreasonable. The Confirmation Hearing should not be treated as a *fait accompli*, and the admission of *viva voce* testimony will play a significant, persuasive role in challenging the evidence of the Prosecutor and convince the Chamber that the required burden of proof has not been met. The Defence does not wish to “anticipate the Trial stage”¹³ by calling an unreasonable or excessive amount of witnesses. Rather, the Defence simply submits that the current limit of two witnesses is neither adequate nor just, given the wide geographical and factual scope of the events which are the subject of the current proceedings. Moreover limiting the number of witnesses is becomes more problematic when the Chamber considers that the DCC has yet to be disclosed.

Impact on the Expeditiousness of Proceedings

15. The Defence contends that the Impugned Order significantly affects the expeditiousness of the proceedings. By limiting the number of *viva voce* witnesses, the ability of the Defence to demonstrate that the Prosecution has not satisfied the burden of proof is appreciably undermined. The Defence respectfully submits that were it permitted to call the requested number of *viva voce* witnesses, any possible charges against Mr. Ali would not be confirmed. Accordingly, any

¹² ICC-01/09-02/11, para. 13.

¹³ ICC-01/09-02/11, para. 13.

subsequent proceedings with one less accused would proceed more expeditiously.

Impact on the Outcome of the Trial

16. The Impugned Order impacts the outcome of the Trial, because the inability of the Defence to counter the evidence of the Prosecutor via persuasive, live testimony risks will turn the Confirmation Hearing into a *pro forma* proceeding regarding the potential charges.

An immediate resolution may materially advance the Proceedings

17. The Defence respectfully submits that it is evident that an immediate resolution of the Appeals Chamber would materially advance the proceedings. By granting this leave to appeal, the potential saving of the court's time and resources would be considerable. Should the Defence be allowed to call the requested 8 *viva voce* witnesses, its case will be more fully explained at the Confirmation stage. With such an opportunity it is submitted that the charges would not be confirmed against Mr. Ali, thereby materially advancing of the proceedings by virtue of his exclusion from any future Trial proceedings. An immediate resolution of this issue is not just in the interests of the Defence, but also in the interests of the Court.

Conclusion

18. For the foregoing reasons, the Defence respectfully requests the Pre-Trial Chamber to grant leave to appeal the Pre-Trial's *Order 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* on the issue identified herein.

Respectfully submitted,



Evans Monari and Gershon Otachi Bw'omanwa
On behalf of Mohammed Hussein Ali

Dated this 15th day of August 2011

At Nairobi, Kenya