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

Date: 15 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

Application for Leave To Appeal on Behalf of Uhuru Kenyatta 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', 10 August 2011

Source: Defence

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:
Karim A.A. Khan QC and Kennedy Ogetto
Counsel for Uhuru Muigai Kenyatta:
Steven Kay QC and Gillian Higgins
Counsel for Mohammed Hussein Ali:
Evans Monari and Gershom Otachi

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

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Ms. Silvana Arbia, Registrar

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. 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. In compliance with the directive of the Single Judge, the Defence for Uhuru Kenyatta filed its '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 Annex A' ("Defence Submission").³
3. The Defence respectfully requested the Pre-Trial Chamber to permit the calling of five *viva voce* witnesses on behalf of Uhuru Kenyatta at the confirmation hearing. The Defence addressed in detail the nature and scope of the hearing including the right of the suspect to challenge the evidence presented by the Prosecutor and to present evidence. The Defence set out the remit of the proposed testimony and its relevance to the case as disclosed by the Prosecutor to date. The Document Containing Charges has yet to be served on the Defence.

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 Submission on Behalf of Uhuru Muigai Kenyatta on the Nature and Scope of the Confirmation Hearing and the Calling of Live Evidence, with Confidential *Ex-Parte* Annex A", 5 August 2011, ICC-01/09-02/11-216 + Conf Exp Anxs.

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.'⁴
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'.⁵ 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.⁶
6. The Single Judge subsequently concluded that by limiting each suspect to calling a maximum of two *viva voce* witnesses, the Defence would still 'meaningfully exercise its rights provided for by article 61(6) of the Statute.'⁷ The respective Defence teams were accordingly 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.⁸ The Defence for Uhuru Kenyatta filed the amended list on 15 August.⁹

⁴ 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-01/09-02/11-226.

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-01/09-02/11-226, at para. 13.

⁶ 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-01/09-02/11-226, at para. 21.

⁷ I 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-01/09-02/11-226, at paras. 24 and 28.

⁸ 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-01/09-02/11-226, Disposition.

⁹ Pre-Trial Chamber II, The Prosecutor v Muthaura et al., "Defence Submission Pursuant to the 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, 10 August 2011", 15 August 2011, ICC-01/09-02/11-238-Conf-Exp.

7. The Defence hereby seeks leave to appeal the Pre-Trial Chamber's order of 10 August 2011.

II. CRITERIA FOR LEAVE TO APPEAL

8. The Defence files this application for leave to appeal pursuant to Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules, and Regulation 65 of the Regulations of the Court.
9. 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

III. ISSUE OF APPEAL

10. The Defence for Uhuru Kenyatta submits that the Single Judge erred in exercising her discretion to implement her duty to 'organise the proceedings'¹¹ by limiting each Defence team to calling only two *viva voce* witnesses at the confirmation hearing. In particular, the Single Judge failed to give sufficient

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 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-01/09-02/11-226, at para. 15.

weight to the detail and individual circumstances of each defence case and arbitrarily restricted each of the teams to calling only two live witnesses.

11. The only reference by the Single Judge to the information provided in respect of the proposed *viva voce* testimony concerning Uhuru Kenyatta was an observation that “although witnesses 1 to 3 would testify about distinct events, the subject matter of their evidence is essentially the same”.¹² The Defence takes issues with the accuracy of this observation and submits that this approach demonstrates in part, the Single Judge’s failure to give sufficient consideration to the detail and individual circumstances of the approach proposed at confirmation by the Uhuru Kenyatta Defence team, a central component of which was the calling of five *viva voce* witnesses.¹³

IV. IMPACT ON THE FAIRNESS OF THE PROCEEDINGS

12. The Defence respectfully submits that the decision to restrict the calling of live evidence to two *viva voce* witnesses per Defence team significantly impacts upon the fairness of the proceedings, and on the ability of the Defence to mount an effective case at confirmation. It fails to take into account the particulars of each suspect’s case and the arguments mounted for allowing each team to determine the appropriate number of *viva voce* witnesses.
13. The limitation of two *viva voce* witnesses per team will result in the Pre-Trial Chamber not receiving the best evidence at confirmation, which will in turn impact upon the fairness of the proceedings. For example, a witness with exonerating evidence may not be afforded the best platform to explain, elaborate or assist the Chamber in determining whether or not the Prosecutor has brought sufficient evidence to establish substantial grounds. The calling of

¹² 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-01/09-02/11-226, at para. 23.

¹³ Pre-Trial Chamber II, The Prosecutor v Muthaura et al., “Defence Submission on Behalf of Uhuru Muigai Kenyatta on the Nature and Scope of the Confirmation Hearing and the Calling of Live Evidence, with Confidential *Ex-Parte* Annex A”, 5 August 2011, ICC-01/09-02/11-216 + Conf Exp Anxs, paras. 16-23.

selected *viva voce* evidence at the confirmation stage affords the Defence the crucial opportunity of presenting coherent evidence of a higher probative value than written witness statements or anonymous witness summaries. Oral evidence can be tested and probed by the Pre-Trial Chamber in a way that is singularly different from the presentation of evidence in any other format. Ultimately, it is the probative value of the evidence presented that will determine whether or not the Prosecutor has cleared the evidential threshold of substantial grounds. The ability of the Defence to call oral evidence on key aspects of the case alleged against the Suspects is fundamental to their task of demonstrating that the Prosecutor has not cleared this burden.

14. Notwithstanding the right of the Defence to present written evidence at confirmation, the arbitrary restriction imposed by the Single Judge to two *viva voce* witnesses per team denies the Defence the ability to properly challenge the case alleged at the confirmation stage and thereby contravenes Article 61(6) of the Rome Statute. The decision by the Prosecutor to rely solely on documentary evidence at the confirmation stage must not impinge or restrict in any way the calling of relevant *viva voce* evidence by the Defence.
15. The Defence submits that in order 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. While the Defence recognises that *viva voce* testimony is not an exclusive right at the confirmation stage, it is respectfully submitted that the current limit of two live witnesses is manifestly insufficient and unreasonable.
16. The confirmation hearing should not be treated as a *fait accompli*, and the Defence contends that the admission of potent live *viva voce* testimony will play a significant, persuasive role in challenging the evidence of the Prosecutor and establishing that the evidential burden has not been met in this case. Contrary to the suggestion of the Single Judge, the Defence does not wish to 'anticipate

the Trial stage¹⁴ by calling an unreasonable or excessive amount of witnesses nor does it intend to operate under a different standard of proof to that which is required at the confirmation stage. Rather, the Defence simply submits that the current limit of two witnesses is neither adequate nor just in the circumstances, given the wide geographical and factual scope of the events which are the subject of the current proceedings.

IV. IMPACT ON THE EXPEDITIOUSNESS OF PROCEEDINGS

17. The Appeals Chamber has held that in considering the impact on the expeditiousness of the proceedings, the term 'proceedings' should be defined as follows:

"The term "proceedings" as encountered in the first part of article 82(1)(d) is not confined to the proceedings at hand but extends to proceedings and subsequent thereto".¹⁵

18. The limitation of two *viva voce* witnesses per defence team will significantly affect the expeditious conduct of these proceedings. By limiting the number of *viva voce* witnesses, the ability of the Defence to persuade the Chamber that the Prosecution has not satisfied the burden of proof will be appreciably undermined. The Defence will be severely restricted in the amount of highly probative live evidence it can employ to demonstrate the inadequacy of the Prosecution's case. This in turn may impact upon the ability of the Defence to persuade the Pre-Trial Chamber at this stage to halt the proceedings. The Defence submits that allowing the Defence to call the number of live witnesses originally proposed, may in the long-term result in the elimination of the need for a lengthy and expensive trial.

¹⁴ 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-01/09-02/11-226, at para. 13.

¹⁵ Appeals Chamber, *Situation in DRC*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, at para. 12.

20. In the alternative, in accordance with the jurisprudence of the International Criminal Court, even if a reversal of the Single Judge's decision would lead to lengthier proceedings in the long run, such an outcome would also constitute an issue which impacts upon the expeditiousness of the proceedings.¹⁶

VI. IMPACT ON THE OUTCOME OF THE TRIAL

21. The order of the Single Judge will significantly affect the outcome of the trial in the sense that such a restriction upon the Defence to counter the evidence of the Prosecutor using persuasive, probative live testimony risks turning the confirmation process into a rubber-stamping of the charges against the Suspects. Such an approach risks the inability of the Defence to persuade the Pre-Trial Chamber to halt the proceedings at this stage.

VII. AN IMMEDIATE RESOLUTION MAY MATERIALLY ADVANCE THE PROCEEDINGS

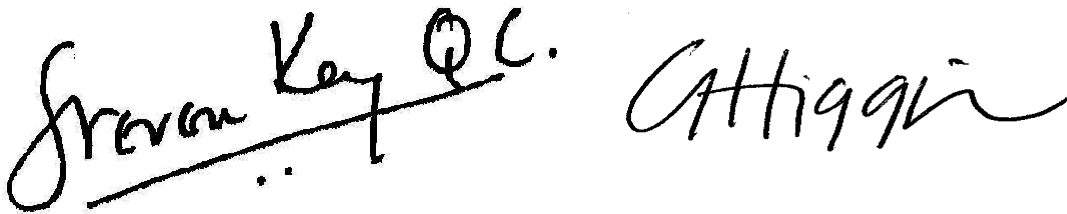
22. The Defence submits that an immediate resolution of the issue by the Appeals Chamber would materially advance these proceedings. By granting leave to appeal, the Appeals Chamber will determine in due course whether or not the Single Judge erred in her decision to restrict the calling of live evidence at the confirmation stage. A decision in this regard may advance the proceedings either by confirming the Single Judge's order and thereby bringing certainty to the manner in which these proceedings will be conducted, or by reversing the decision and allowing the Defence to call its proposed *viva voce* evidence which may in turn persuade the Pre-Trial Chamber to halt the proceedings against Uhuru Kenyatta.

¹⁶ See, for example: Pre-Trial Chamber I, Prosecutor v Katanga and Ngudjolo, "Decision on the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Language", 18 January 2008, ICC-01/04-01/07-149, at pp. 5-6; Pre-Trial Chamber I, The Situation in the Democratic Republic of the Congo, "Decision on Request for Leave to Appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", 23 January 2008, ICC-01/04-438.

VIII. RELIEF REQUESTED

23. 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'.

Respectfully submitted,

The image shows two handwritten signatures in black ink. The first signature, on the left, is 'Steven Kay QC.' and is underlined. The second signature, on the right, is 'Gilligan'.

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

Dated this Monday, 15 August 2011

At London, United Kingdom