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

Date: 19 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 Document

Prosecution's consolidated response to Mr. Ali's and Mr. Kenyatta's requests 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"

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for Francis Kirimi Muthaura
Karim A. Khan and Kennedy Ogeto

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohammed Hussein Ali
Evans Monari, Gershom Otachi

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence teams of Mr. Ali¹ and Mr. Kenyatta² (“Defence”) request leave to appeal the decision of the Single Judge to reduce the number of witnesses to be called to testify at the confirmation of charges hearing.³ Mr. Muthaura also requests to join the applications.⁴ The applications put forward essentially the same issue,⁵ namely whether the Single Judge erred in restricting the Defence for each suspect to a maximum of two *viva voce* witnesses for the forthcoming confirmation hearing on 21 September 2011 (“Issue”). The applications also rely on similar arguments. Therefore, the Prosecution files one consolidated response to both applications.
2. The Prosecution submits that the Defence applications fail to demonstrate that the Issue for which leave to appeal is sought meets the criteria under Article 82(1)(d). They must therefore be rejected.

Background

3. On 20 July 2011, the Single Judge ordered the parties to indicate 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.⁶ While the Prosecution stated that it would not call any live witnesses at the confirmation of charges hearing,⁷ the Defence for Mr. Muthaura indicated its intention to call a maximum of nine witnesses;⁸ the

¹ ICC-01/09-02/11-239.

² ICC-01/09-02/11-242.

³ ICC-01/09-02/11-226.

⁴ ICC-01/09-02/11-245.

⁵ ICC-01/09-02/11-245, fn.10.

⁶ ICC-01/09-02/11-64, operative part, letter (c)(i).

⁷ ICC-01/09-02/11-218.

⁸ ICC-01/09-02/11-215-Conf-Exp, para.3; and ICC-01/09-02/11-223.

Defence for Mr. Kenyatta a maximum of four witnesses;⁹ and the Defence of Mr. Ali a maximum of ten witnesses.¹⁰

4. On 10 August 2011, the Single Judge issued an order reducing the number of witnesses to be called to testify at the confirmation of charges hearing “to a maximum of two for each suspect” (“Decision”).¹¹ Bearing in mind the limited scope of the confirmation hearing, the Single Judge exercised her inherent power to organize the proceedings in a fair and expeditious manner, and determined that calling 23 witnesses at this stage was “manifestly excessive and disproportionate”, as this would “constitute a mere anticipation of the trial stage of the case”.¹²
5. On 15 August 2011, the Defence of Mr. Ali filed an application for leave to appeal the Decision (“Ali’s Application”),¹³ on the 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”.¹⁴
6. On the same date, the Defence of Mr. Kenyatta filed its application for leave to appeal the Decision (Kenyatta’s Application)¹⁵ on the issue that “the Single Judge erred [...] by limiting each Defence team to calling only two *viva voce* witnesses at the confirmation hearing”.¹⁶
7. On 16 August 2011, the Defence of Mr. Muthaura joined Kenyatta’s Application and endorsed the issue included in Kenyatta’s Application and Ali’s Application as well as the arguments put forward in those applications.¹⁷

⁹ ICC-01/09-02/11-216-Conf-Exp-AnxA.

¹⁰ ICC-01/09-02/11-219-Conf-Exp-Anx.

¹¹ ICC-01/09-02/11-226.

¹² Decision, para.13; see also para.15.

¹³ ICC-01/09-02/11-239.

¹⁴ Ali’s Application, para.10.

¹⁵ ICC-01/09-02/11-242.

¹⁶ Kenyatta’s Application, para.10.

¹⁷ ICC-01/09-02/11-245; see para.6 and footnote 10. The Prosecution notes that neither the Rules nor the Regulations expressly allow for a party to join an application for leave to appeal made by another party.

Submissions

8. The Prosecution objects to the Applications as the Issue does not meet the criteria for leave to appeal under Article 82(1)(d).

The Issue does not affect the fairness of the proceedings

9. The Defence argues that the Issue affects the fairness of the proceedings and its ability to mount an affective defence against the charges.¹⁸ It alleges that the 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 proceedings¹⁹ and as this affects the Defence’s ability to present the best evidence to the Pre-Trial Chamber.²⁰ The Defence also generally refers to its right under the Statute to present evidence²¹ and the need of *viva voce* testimony to challenge the evidence of the Prosecution.²²
10. The Defence arguments are abstract and fail to demonstrate how in this particular case the Single Judge’s discretionary decision to limit the number of *viva voce* witnesses to be called by each of the Defence teams affects the fairness of the proceedings. As previously found by Trial Chamber II, such an approach falls short of meeting the requirements under Article 82(1)(d).²³
11. The Prosecution notes that the Decision takes note of the limited scope of the confirmation of charges hearing²⁴ and carefully balances the rights of the Suspects against the need to properly organize the proceedings:²⁵ While the Decision limits the number of *viva voce* witnesses, it expressly allows the Defence to rely on additional documentary evidence and written witnesses’ statements, including

¹⁸ Ali’s Application, para.11; Kenyatta’s Application, para.12.

¹⁹ Ali’s Application, para.14.

²⁰ Kenyatta’s Application, para.13.

²¹ Ali’s Application, para.13.

²² Ali’s Application, para.14 ; Kenyatta’s Application, paras.13-16.

²³ ICC-01/04-01/07-1958, para. 20.

²⁴ Decision, paras. 11-12.

²⁵ Decision, para.15.

statements to be presented in the form of summaries.²⁶ Within these parameters it is up to the Defence to present its evidence to the Pre-Trial Chamber. In this case, however, the Defence has failed to demonstrate why *viva voce* testimony beyond the two witnesses who are allowed “cannot be properly substituted by documentary evidence or witnesses’ written statements”.²⁷ In the absence of such a showing, the Defence argument must be rejected.

The Issue does not affect the expeditiousness of the proceedings

12. The Defence contends that the charges against the Suspects would not be confirmed if it were permitted to call the requested number of *viva voce* witnesses and therefore proceedings would be expedited as there will be no need for a lengthy and expensive trial²⁸ or the proceedings would be conducted against fewer accused persons.²⁹
13. This argument is hypothetical and does not demonstrate any concrete impact of the Issue on the expeditious conduct of the proceedings.³⁰ It is for the Pre-Trial Chamber to determine, on the basis of the confirmation of charges hearing, whether there is sufficient evidence to establish substantial grounds to believe that Ali committed any of the crimes charged.³¹ There is no hierarchy within the types of evidence that may be offered at the confirmation hearing, and no basis for the underlying theory that *viva voce* testimony must necessarily be given greater weight than documentary evidence. Any speculation by the Defence at this stage about the outcome of the hearing is irrelevant, especially since, as noted by the Defence, the document containing the charges has yet to be disclosed.³²

²⁶ Decision, paras.12, 27, 28.

²⁷ Decision, para.12, quoting it prior decision ICC-01/09-02/11-181, para.9.

²⁸ Kenyatta’s Application, para.18.

²⁹ Ali’s Application, para.15.

³⁰ ICC-01/04-01/07-2463, para. 31.

³¹ Article 61(7).

³² Ali’s Application, paras.11, 14.

14. Moreover, the Prosecution notes that if the Defence were allowed to call an additional 10 witnesses – or, if Mr. Muthaura’s endorsement of the Ali and Kenyatta Applications were sufficient to entitle him to identical relief – an additional 17 witnesses -- at the confirmation hearing as requested, this would prolong the proceedings and therefore have a negative impact on their expeditious conduct.

The Issue does not affect the outcome of the trial

15. The Defence argues that the Issue affects the outcome of the trial, as the inability of the Defence to present additional *viva voce* witnesses will turn the confirmation hearing into a “*pro forma* proceeding” or “rubber-stamping” of the potential charges.³³

16. This argument must also be rejected. It is speculative and unsupported and the Defence does not even explain what it means by “*pro forma* proceedings”, or “rubber-stamping” of the charges. In any event, and as demonstrated above,³⁴ the Single Judge did not set limits on the quantity of evidence that may be offered, but merely restricted the number of *viva voce* witnesses. Her decision fully protects the Defence’s right to present evidence pursuant to Article 61(6)(c) and also ensures that the proceedings will be conducted fairly and expeditiously.

An immediate resolution of the Issue by the Appeal Chamber will not materially advance the proceedings

17. The argument of the Defence that the immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings is predicated on the unsupported assumption that the charges will not be confirmed if the Defence

³³ Ali’s Application, para.16; Kenyatta’s Application, para.21.

³⁴ See para.11 above.

were allowed to present more than two *viva voce* witnesses.³⁵ As demonstrated above,³⁶ this assumption is misplaced and the argument must therefore be rejected.

18. The Prosecution also notes that the Decision will not cause any irreversible prejudice to Mr. Ali or Mr. Kenyatta. First, and as stated by the Single Judge, proceedings under Article 61 have a limited scope³⁷ and do not involve any pronouncement on the guilt or innocence of the suspects. Second, and more importantly, the Decision does not prevent the Defence from calling the same witnesses within its broader presentation of evidence at trial, if and when the charges against the Suspects are confirmed.

Conclusion

19. For the reasons set out above, the Prosecution requests that the Single Judge Reject the Defence Application.



Luis Moreno-Ocampo,
Prosecutor

Dated this 19th day of August, 2011
At The Hague, The Netherlands

³⁵ Ali's Application, para.17; Kenyatta's Application, para.22.

³⁶ See para.13 above.

³⁷ Decision, para.11.