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No.: ICC-01/09-02/11
Date: 29 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***

PUBLIC

URGENT

**DEFENCE REQUEST FOR A STATUS CONFERENCE CONCERNING THE
PROSECUTION'S DISCLOSURE OF 19TH AUGUST 2011 AND THE
DOCUMENT CONTAINING THE CHARGES AND ARTICLE 101 OF THE
ROME STATUTE**

Source: Defence

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

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I. PROCEDURAL BACKGROUND

1. On 15 December 2010, the Prosecutor submitted the “Prosecutor’s Application Pursuant to Article 58 as to Ambassador Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” (the “Article 58 Application”).¹
2. On 8 March 2011, the Pre-Trial Chamber (the “PTC”) issued its “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” issuing, by a majority, summons for all three suspects.²
3. On 6 April 2011, the Single Judge issued her “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “First Disclosure Decision”) which set out the principles governing disclosure.³
4. The initial appearance took place on 8 April 2011. At this hearing the Pre-Trial Chamber (the “PTC”) scheduled the confirmation hearing to take place on 21 September 2011.
5. On 20 April 2011, the Single Judge issued the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties” (the “Second Disclosure Decision”), in which she established the calendar for disclosure setting out the various time limits for

¹ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Prosecutor’s Application Pursuant to Article 58 as to Ambassador Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010, ICC-01/09-31-Conf-Exp and its annexes.

² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the Prosecutor’s Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01.

³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48.

service by the Defence and Prosecution as well as deadlines for the submission of properly justified proposals for redactions.⁴

6. The Prosecution has disclosed to date its evidence to the Defence on the following dates: 3 June 2011,⁵ 24 June 2011,⁶ 19 July 2011,⁷ 25 July 2011,⁸ 29 July 2011,⁹ 8 August 2011,¹⁰ 19 August 2011,¹¹ and 25 August 2011. The Prosecution disclosed the Document Containing the Charges, (the “DCC”), List of Evidence to be relied on at the confirmation hearing and related analysis tables on 19 August 2011.¹²
7. The PTC has to date issued five decisions upon the Prosecution’s redaction proposals on the following dates: 12 July 2011,¹³ 22 July 2011,¹⁴ 4 August 2011,¹⁵ 17 August 2011,¹⁶ and 19 August 2011.¹⁷

⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, ICC-01/09-02/11-64.

⁵ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s First Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence, 3 June 2011, ICC-01/09-02/11-100 + Anxs A~D & G + Conf-Anxs E, F & H.

⁶ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s First Communication of the Disclosure of Potentially Exculpatory Evidence and Second Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence, 24 June 2011, ICC-01/09-02/11-135 + Anxs A ~ C and Conf-Anxs D – E.

⁷ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s First Communication to the Defence of Redacted Incriminating Evidence Pursuant to Article 61(3)(b), Potentially Exculpatory Evidence Pursuant to Article 67(2) and Material Subject to Disclosure Pursuant to Rule 77, 19 July 2011, ICC-01/09-02/11-179-Conf and Conf-Anxs A-G

⁸ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Second Communication to the Defence of Redacted Potentially Exculpatory Evidence Pursuant to Article 67(2), 25 July 2011, ICC-01/09-02/11-193-Conf + Conf-AnxA

⁹Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Third Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence, 29 July 2011, ICC-01/09-02/11-204 + AnxA&B + Conf-AnxC

¹⁰ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Second Communication of the Disclosure of Potentially Exculpatory Evidence and Fourth Communication of the Disclosure of Rule 77 Materials to the Defence, 8 August 2011, ICC-01/09-02/11-221 + AnxA + Conf-AnxB.

¹¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Fourth Communication to the Defence of Redacted Incriminating Evidence Pursuant to Article 61(3)(b), ICC-01/09-02/11-259-Conf + Conf-Anxs

¹² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Document Containing the Charges, List of Evidence and Comprehensive In-Depth Analysis Chart of Evidence Included in the List of Evidence Submitted Pursuant to Article, 19 August 2011, ICC-01/09-02/11-257-AnxA + AnxA + Conf-Anxs B~C1toC5.

¹³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted First Decision on the Prosecutor’s Request for Redactions, 12 July 2011, ICC-01/09-02/11-165-Conf-Red.

8. On 26 August 2011, the Muthaura team filed “Defence Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be Ordered to Re-File an Amended DCC and LoE” (“Preliminary Motion”).¹⁸ This motion addressed defects in the DCC, the LoE and the timing and manner of the OTPs disclosure. A corrigendum of the Preliminary Motion was filed on 28 August 2011.¹⁹

II. THE PRELIMINARY MOTION FILED ON BEHALF OF FRANCIS MUTHAURA

9. The Defence for Mr Uhuru Kenyatta and Mohammed Ali adopts paragraphs 15-38 of the Preliminary Motion filed on behalf of Francis Muthaura on 26th August 2011 as amended by the service of the corrigendum on 28th August 2011.

III. THE DOCUMENT CONTAINING CHARGES AND ARTICLE 101 OF THE ROME STATUTE

10. Article 101(1) and (2) of the Rome Statute provides as follows:

¹⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted Second Decision on the Prosecutor’s Request for Redactions, 22 July 2011, ICC-01/09-02/11-178-Conf-Red.

¹⁵ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted Third Decision on the Prosecutor’s Request for Redactions, 4 August 2011, ICC-01/09-02/11-205-Conf-Red.

¹⁶ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted Forth Decision on the Prosecutor’s Request for Redactions, 17 August 2011, ICC-01/09-02/11-236-Conf-Red.

¹⁷ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted Fifth Decision on the Prosecutor’s Request for Redactions, 19 August 2011, ICC-01/09-02/11-245-Conf-Red.

¹⁸ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE, 26 August 2011, ICC-01/09-02/11-268.

¹⁹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Corrigendum to “Defence Preliminary Motion Alleging Defence in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC and LoE”, 28 August 2011, ICC-01/09-02/11-268-Corr + Anx.

“A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.”

“The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States parties shall have the authority to provide waiver to the Court and should endeavor to do so.”

11. Article 101 does not make any distinction between a person, who is arrested pursuant to an arrest warrant, and a person, who voluntarily surrenders to the Court pursuant to a summons to appear. The underlying rationale of article 101 – to protect State sovereignty – applies to both scenarios as irrespective of whether a person is arrested or surrenders, the State must be in a position to make an informed decision as to whether to divest their jurisdiction over the person in light of potential ongoing or completed domestic investigations and prosecution against the person.
12. Moreover, “[f]or the *extraditee*, the surrender implies a massive infringement into his or her freedom. Thus the limitations of this infringement stemming from the observance of the specialty rule provide an important *protection* for the surrendered person’s rights and interests”.²⁰ For this reason, Rule 196 of the Rules of Procedure and Evidence expressly permits a person surrendered to the Court to provide views on a perceived violation of Article 101 of the Statute.
13. The Defence submits that pursuant to the rule of speciality in Article 101, the Suspects cannot be “proceeded against” in respect of the following conduct that was not contained in the Summonses issued by the PTC:

²⁰ P Wilkitzki, ‘Article 101, Rule of Specialty’, (Triffterer ed.) Commentary on the Rome Statute of the International Criminal Court (Hart Publishing, Oxford 2008), p.1636.

- (i) The allegation of rape in Naivasha;²¹
 - (ii) The expansion of the temporal period from 30 December 2007 to 29 February 2008. The summons decision referred to the period “on or about 24 January 2008 until 31 January 2008.”
 - (iii) The expansion of the locations included in all counts alleged in the DCC: The summons decision was confined to crimes allegedly committed in Nakuru and Naivasha. The DCC refers to “in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha Town (Naivasha District, Rift Valley Province).
14. In the present case, the PTC has not requested a waiver of the requirements in paragraph 1 of Article 101 from the State of Kenya that surrendered the Suspects to the Court. In the circumstances, the Defence requests the PTC to order the OTP to re-file its DCC amending the counts contained therein.

IV. SUBSTANTIAL NEW ALLEGATIONS IN THE DISCLOSURE AND THE DCC

15. The Defence submits that the manner and timing of the OTP’s disclosure fails to provide the Defence with adequate notice of the evidentiary basis of the OTP’s case in time for the upcoming confirmation hearing.²² The substance and detail of the core evidence against Uhuru Kenyatta and Mohammed Ali was disclosed to the Defence for the first time on 19th August 2011. This evidence consists of over 1,400 pages of transcripts of witness interviews. Annex 1 contains a breakdown of the evidence and the extent of the information contained within the DCC and Prosecution’s Annexes. In summary:

²¹ The Chamber found that “there are no reasonable grounds to believe that rape as an act constituting crimes was committed in Naivasha”: ICC-01/09-02/11-01, para 26, last sentence.

²² Paragraph 27 of the Preliminary Motion.

- (i) The Prosecution's list of evidence refers to 351 documents, the substantive core of which were disclosed for the first time on 19th August 2011;
 - (ii) The Prosecution's five analysis charts (C1-5) total 6,644 pages;
 - (iii) The evidence disclosed to the Defence on 19 August 2011 consisted of 85 documents: 1,423 pages and 44 minutes 31 seconds of video;
 - (iv) The DCC is 44 pages, at least 25 of which are directly relevant to Uhuru Kenyatta and at least 30 of which are relevant to Mohammed Ali.
 - (v) 126 of the footnotes contained in the DCC are directly relevant to Uhuru Kenyatta and make reference to 403 documents;
 - (vi) 83 of the footnotes in the DCC are directly relevant to Mohammed Ali and make reference to 225 documents;
 - (vii) The Defence for Uhuru Kenyatta has also compiled a footnote analysis/extraction document, which contains extracts from the relevant footnoted documents from the DCC in order to process this information. This analytical tool consists of 458 pages plus 5 documents totaling 190 pages and two video files.
16. In addition to the scale and significance of the disclosure on 19th August and the DCC, this material also contains a plethora of major allegations that have been notified to the Defence for the first time. This notification was provided only 17 days before the Defence is required to submit the evidence it intends to rely upon to the PTC and the Prosecution.
17. The new allegations and detail therein concerning Uhuru Kenyatta include the following:
- (i) Uhuru Kenyatta and Muthaura put in place concrete plans to ensure the smooth initiation and success of retaliatory operations to be carried out by the Mungiki and pro-PNU youth (DCC para 51);
 - (ii) Uhuru Kenyatta, activated and utilized pre-existing structures, such as
 - a. the Mungiki to perpetrate the widespread and systematic attacks

- b. and the Kenya Police to ensure that the Mungiki operations were not interfered with (DCC para 36);
- (iii) Uhuru Kenyatta contributed by:
 - a. conceiving the idea of the coordinated attacks against ODM supporters,
 - b. encouraging them to work with the Kenya Police,
 - c. recruiting pro-PNU youth as direct perpetrators
 - d. providing them with logistical and other support,
 - e. directing the perpetrators to implement the common plan (DCC para 80)
 - f. mobilized, armed and financed the Mungiki and pro PNU youth for the purpose of carrying out operations in the Rift Valley during the PEV;
 - g. through a series of meetings held in Nairobi between the end of December 2007 and end of January 2008, Uhuru Kenyatta organized and financed retaliatory attacks by the Mungiki against perceived ODM supporters in the Rift Valley;
 - h. in one particular meeting with Mungiki leaders in Nairobi in early January 2008, Uhuru Kenyatta gave the Mungiki some operational directions for the retaliatory attacks;
 - i. at the local level in Nakuru, Uhuru Kenyatta specifically tasked a former KANU MP to coordinate the retaliatory attacks (DCC para 82);
- (iv) In coordination with wealthy PNU supporters, Uhuru Kenyatta exercised control over the financial aspects of the common plan (DCC para 83);
- (v) Uhuru Kenyatta played a central role in the development of the operational plans of the Mungiki and pro-PNU youth and the Kenya Police (DCC para 91);
- (vi) Uhuru Kenyatta had associated with the Mungiki since 2000 (DCC para 22 and 37);

- (vii) At all times relevant to the crimes charged, Kenyatta had the capacity to mobilise and influence Mungiki members (DCC para 37);
- (viii) He had control over them in part due to his wealth and privileged background (DCC para 37). It is augmented by his status wealth and/or position as a senior or government official (DCC para 84);
- (ix) Uhuru Kenyatta was aware of the authority he had over the Mungiki and pro-PNU youth as well as his leadership role in the implementation of the common plan (DCC para 93);
- (x) In turn the Mungiki received protection and patronage from Uhuru Kenyatta (DCC para 37);
- (xi) Uhuru Kenyatta is alleged to be a Mungiki leader (DCC para 39);
- (xii) Through the involvement of Mungiki leaders in the common plan, Muthaura and Kenyatta exercised control over Mungiki members and pro PNU youth and ensured that they were recruited and instructed to perpetrate the attacks (DCC para 83);
- (xiii) In procuring the services of Mungiki leaders and securing their participation in the common plan, Muthaura and Kenyatta also placed themselves on top of the Mungiki hierarchy (DCC para 84);
- (xiv) Uhuru Kenyatta (and Muthaura) had the capacity to
 - a. establish a functioning command structure by making use of existing structures of the Kenya Police and the Mungiki;
 - b. establish a localized level of subordinates among local PNU politicians who were responsible for geographical areas familiar to them, allowing for maximum control over attacks on specific locations;
 - c. use meetings to communicate with other members of the common plan to ensure that they acted in concert towards the implementation of the common plan;
 - d. impose order through existing disciplinary regimes of the Kenya Police and the Mungiki. (DCC para 85);

- (xv) Due to his official capacity and /or past interactions Uhuru Kenyatta had detailed inside knowledge of the structure and the prior criminal activities of the Mungiki (DCC 92);
- (xvi) After the election Uhuru Kenyatta and Muthaura facilitated the meetings with the Mungiki with a view to organizing retaliatory attacks to strengthen the PNUs hold on power (DCC para 20, 21 and 55);
- (xvii) The key preparatory meetings include those in Nairobi on or about 30 December 2007 (DCC para 50);
- (xviii) There were also preparatory meetings
 - a. in Central Province on or about 31 December 2007
 - b. in Nakuru in early to mid January 2008
 - c. In Naivasha in late January 2008 (DCC para 50);
- (xix) Uhuru Kenyatta played a central role in the meetings by directing the activities of the Mungiki and pro-PNU youth (DCC para 92);
- (xx) Meetings were held by Uhuru Kenyatta and Muthaura among others to activate the Mungiki and pro-PNU youth by placing the organization under a central authority and to coordinate the implementation of the common plan (DCC para 78);
- (xxi) Other activities were carried out by Uhuru Kenyatta at the central and local levels to adopt and implement the common plan and the systematic nature of the attacks and to:
 - a. Mobilise
 - b. Instruct
 - c. Incite
 - d. Arm
 - e. Supply
 - f. Finance
 - g. Coordinate
 - h. Provide logistical support to the Mungiki (DCC para 44);
- (xxii) Uhuru Kenyatta participated in meetings with other members of the common plan to ensure that they understood and espoused the common plan (DCC para 83);

- (xxiii) At offices belonging to KANU, headed by Uhuru Kenyatta
 - a. Recruitment,
 - b. mobilization
 - c. payment of pro-PNU youth to participate in the retaliatory attack in Naivasha and Nakuru (DCC para 52);
- (xxiv) Uhuru Kenyatta
 - a. directly provided funding for Mungiki operations during the PEV or provided information as to where to secure funding. (DCC para 52)
 - b. was responsible for arming and providing transport for pro-PNU youth. (DCC para 52)
 - c. mobilized and authorized the Mungiki and Pro-PNU youth to implement the common plan
 - d. Solicited the support and contribution of local politicians and businessmen (DCC para 26)
- (xxv) Uhuru Kenyatta and Muthaura (relying on network of loyal government officials, business men and politicians) provided:
 - a. funding,
 - b. transportation,
 - c. accommodation,
 - d. uniforms,
 - e. weapons and
 - f. logistical support to the Mungiki and Pro-PNU youth to carry out attacks in specific locations. (DCC para 23);
- (xxv) Uhuru Kenyatta procured weapons for the direct perpetrators knowing that the weapons would be used for non peaceful purposes (DCC para 91);
- (xxvi) Uhuru Kenyatta specifically tasked a former KANU MP to organise the Nakuru operations, thereby placing the Mungiki under a responsible command (DCC para 52) and mobilise and control newly recruited pro-PNU youth in Nakuru;

- (xxvii) Uhuru Kenyatta and Muthaura mobilized the Mungiki and Pro-PNU youth to attack perceived ODM supporters in Nakuru town and Naivasha town from the last week of January 2008 (DCC para 22);
- (xxviii) Uhuru Kenyatta provided economic or financial inducements (DCC para 87);
- (xxix) Uhuru Kenyatta was aware that the Mungiki and pro-PNU youth were well-funded ensuring the smooth implementation of the common plan (DCC para 93);
- (xxx) Uhuru Kenyatta was aware of the hierarchically organized structure of the Mungiki and pro-PNU youth and the Kenya Police (DCC para 93);
- (xxxi) Uhuru Kenyatta was aware of the effective local structures of the Mungiki (DCC para 93);
- (xxxii) Uhuru Kenyatta was aware of the circumstances allowing automatic compliance with his instructions such as the size composition and command structures of the Mungiki and the Kenya Police and the disciplinary regime within the Kenya Police and the Mungiki (DCC para 93);
- (xxxiii) Uhuru Kenyatta had knowledge of the killing of Mungiki leaders directly involved in PEV planning meetings with Uhuru Kenyatta and other prominent PNU politicians (DCC para 46 and 49).

18. The new allegations concerning Mohammed Ali include the following:

- (i) Mohammed Ali orchestrated the killing of Mungiki leaders that were involved in the PEV by the Kenyan Police (DCC para. 46 and 49);
- (ii) Mohammed Ali allegedly spoke to Francis Muthaura twice about the upcoming riots and received orders not to arrest the person's involved (page 56 DCC); and
- (iii) Mungiki members wore Kenyan army uniforms during transport (para 65);

19. The new allegations represent a complete change in the direction of the Prosecutor's case and are entirely based upon the witness evidence disclosed on 19th August. It is clear that the entire Prosecution case now rests on the evidence of four witnesses, all of which were only disclosed to the Defence on 19th August 2011. The Defence has the right to be able to challenge this evidence at confirmation and to have sufficient time and opportunity to do so.
20. The evidence disclosed on 19th August and the DCC requires the Defence to investigate the new allegations and interview further witnesses in order to rebut the serious allegations in preparation for the confirmation hearing. The Defence must be afforded a meaningful opportunity to challenge and present evidence²³ as well as the opportunity to obtain evidence that may not merely contradict the Prosecution's case,²⁴ but is capable of constituting evidence which exonerates the Suspects at this stage. Such evidence is capable of bearing upon the decision-making process at confirmation as to whether or not the Prosecution has presented sufficient evidence to establish substantial grounds to believe that the Suspects committed each of the crimes charged.²⁵
21. The disclosure of new substantial allegations on 19th August and the core substance of the Prosecution's case does not afford the Defence adequate notice of the evidentiary basis of the OTP's case in time for the confirmation hearing on 21st September 2011. Neither does the timing of this disclosure provide the Defence with adequate time in which to challenge the evidence, a right which

²³ Article 61(6), Rome Statute.

²⁴ In paragraph 11 of, Pre-Trial Chamber II, *The Prosecutor v Ruto et al.*, Prosecution's Response to the Defence Submissions in Preparation of the Confirmation of Charges Hearing and Request for Re-Classification, 21 June 2011, ICC-01/09-01/11-213, the Prosecution failed to consider the category of evidence set out by HHJ Pikis which is capable of bearing upon the determination of whether or not the standard for the confirmation of charges has been satisfied.

²⁵ HHJ Pikis has recently confirmed the capability of exonerating evidence to have a "bearing on the sufficiency of evidence before the PTC for the purpose of determining whether the standard for the confirmation of charges has been satisfied." Appeals Chamber, *The Prosecutor v Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", ICC-01/04-01/06-1486, 21 October 2008, at para. 43

“cannot be denied to the suspects” and one which the “Single Judge has the responsibility to put the Defence in a position to meaningfully exercise.”²⁶

22. The Defence was required to submit a list of *viva voce* witnesses before the service of this evidence. In the filing on behalf of Uhuru Kenyatta which provided the names of two *viva voce* witnesses as ordered by the PTC on 10 August 2011,²⁷ counsel reserved the right to amend their choice of witnesses in the light of further Prosecution disclosure. The service of the evidence on 19 August impacts directly upon the choice of *viva voce* witnesses by the Defence and further enforces the request of the Defence to call *more than two witnesses* as presently ordered, an issue which the Defence would wish to address in the course of the proposed status conference.

23. The Defence endorses the request on behalf of Muthaura for the scheduling of an urgent status conference in the week of 29th August 2011 before the fully constituted PTC in order to:
 - (i) afford the Defence an opportunity to address the PTC in detail as to the difficulties encountered in preparing for the confirmation hearing given the recent disclosure and content of the DCC; and
 - (ii) afford the Chamber the opportunity of assessing these difficulties and to ensure the preservation of the rights of the Defence in accordance with Article 67(1) of the Statute.

24. The Defence informs the PTC that both Uhuru Kenyatta and Mohammed Ali have waived their rights to attend a status conference dealing with the matters raised herein.

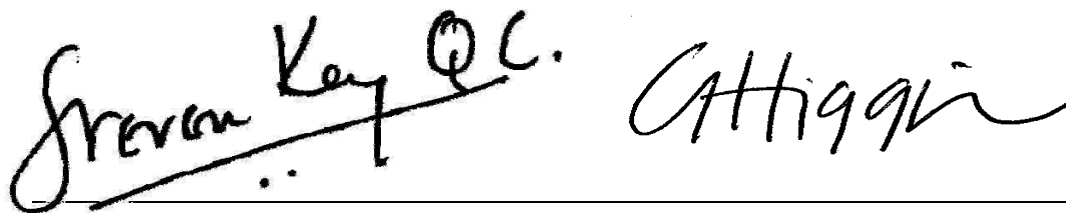
²⁶ Pre-Trial Chamber II, The Prosecutor v Ruto et al., “Order to the Defence to Reduce the Number of Witnesses to be called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses”, 25 July 2011, ICC-01/09-01/11-221, at para. 14

²⁷ Pre-Trial Chamber II, Prosecutor v Muthaura et al., 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, ICC-01/09-02/11-226, at p 13.

V. RELIEF REQUESTED

25. For the reasons set out above and pursuant to Article 67(1)(a) and (b) of the Statute, Rule 121(3) of the Rules and Regulation 52 of the Regulations, the Defence respectfully requests the Single Judge:

- (i) to order the OTP to file an amended DCC, LoE and in-depth analysis chart and;
- (ii) to grant the request for a status conference for the week commencing 29th August 2011 before the fully constituted PTC.



Handwritten signatures of Steven Kay QC and Gillian Higgins. Steven Kay QC's signature is on the left, and Gillian Higgins' signature is on the right. A horizontal line is drawn below the signatures.

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



Handwritten signatures of Evans Monari and Gershom Otachi. Evans Monari's signature is on the left, and Gershom Otachi's signature is on the right. A horizontal line is drawn below the signatures.

Evans Monari and Gershom Otachi
On behalf of Mohammed Hussein Ali

Dated this, Monday 29 August 2011

At London, UK