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

Date: 2 September 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 with Confidential <i>Ex parte</i> Annex A only available to the Muthaura Defence Defence Observations on the Schedule of the Confirmation of Charges Hearing

Source: Defence for Ambassador Francis Kirimi Muthaura

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Other

Introduction

1. The Confirmation of Charges Hearing (“Confirmation Hearing”) is scheduled to commence on 21 September 2011.¹
2. On 30 August 2011, the Single Judge issued her “Decision Requesting Observations on the Schedule for the Confirmation of Charges Hearing” (“Decision”).²
3. The Decision requests the parties to submit by 2 September 2011, their observations for the purposes of establishing the final schedule of the hearing by detailing, in particular, the following:
 - i. Whether they intend to raise questions or challenges concerning jurisdiction or admissibility, pursuant to rule 122(2) of the Rules, and/or to raise objections or make observations concerning issues related to the proper conduct of the proceedings prior to the confirmation hearing pursuant to rule 122(3) of the Rules;³
 - ii. The estimate of the time required for the presentation of arguments and evidence, including audio and video based evidence and geographical maps, if any, as well as the questioning of witnesses, within the time frame indicated in paragraph 8 of the Decision;⁴

¹ ICC-01/09-02/11-T-1-ENG ET WT, page 14, lines 11 to 15. The Chamber decided on the date for the confirmation hearing at the initial appearance hearing held on 8 April 2011.

² ICC-01/09-02/11-272.

³ *Ibid*, p. 6.

⁴ *Ibid*, p. 6. In paragraph 8 of the Decision, the Single Judge indicated that the confirmation hearing shall end by no later than 4 October 2011 and accordingly reminded the parties that informed the parties to take this time frame into account in organizing the presentation of the case.

4. The Decision additionally establishes some guiding principles which the parties should take into account in providing their observations as requested. These principles include *inter alia*:

- i. In organizing the presentation of their case, the parties shall take into consideration the time frame decided by the Single Judge that the hearing which commences on 21 September 2011 shall end by no later than 4 October 2011;⁵ and
- ii. Reminds all parties and participants of the limited purpose of the hearing and accordingly advises them to confine themselves to what is strictly necessary in order that the Chamber, which has carefully read all the filings, discharge its functions pursuant to article 61(7) of the Statute.⁶

Defence Observations

5. The Defence hereby provides its observations on the matter. In reviewing the proposals for a schedule of the upcoming confirmation hearing, the Defence respectfully requests that the Single Judge adopt a flexible approach depending on the exigencies of the confirmation proceedings.⁷

Questions or Challenges concerning jurisdiction

6. The Defence intends to challenge jurisdiction in respect of the case against Ambassador Muthaura at the upcoming confirmation hearing. Rule 58(1) regulates the procedure for challenging jurisdiction and directs that a request or application shall be in writing. Rule 58(2) provides in part that a Chamber “may join the challenge or question to a confirmation or a trial proceeding as long as it

⁵ *Ibid*, para. 8.

⁶ *Ibid*, para. 11.

⁷ ICC-01/09-01/11-294, para. 9. The Single Judge indicated that in the event that a party does not fully utilize the time allotted to it, the Chamber will move automatically to the next presentation [...] The Single Judge expects the parties to be prepared at any time and to be flexible as well.

does not cause undue delay, and in this circumstance shall hear and decide on the challenge first.”

7. The Defence will present both written and oral submissions and evidence in respect of its proposed jurisdictional challenge. Given the importance of the issue, the Defence will provide detailed written submissions and will supplement same with brief oral submissions, preferably at the concluding phase of the scheduled confirmation hearing. Consistent with the language of Rule 58(4), the Defence respectfully requests that the Chamber resolves the jurisdictional issue prior to determining matters on the merit. Resolving the question of jurisdiction before deciding the issues relating to Article 61(7) determination would serve the interests of justice and would be the most efficient use of the Court’s time.

Conduct of Proceedings

8. The Defence suggests that the Chamber follow the confirmation model adopted in the cases of the *Prosecutor v. Abu Garda*⁸ and the *Prosecutor v. Mbarushimana*.⁹ In those cases, each party was allotted a separate block of time in which to present its case or submissions. Adopting the suggested model will enable the parties to present their case in an organised, efficient and synthesised manner and this will in turn enable the Chamber to resolve the issues raised for determination in a clear and concise manner. Additionally, the Defence submits that the suggested model suits cases involving multiple defendants, especially in the instant case, wherein each Defence team has expressed its intention to present *viva voce* witnesses. This model will give each party and participant the flexibility to present their case as they see fit, whilst at the same time providing them with a platform to avoid duplication of evidence and repetition of similar submissions. As an illustration, where one defence team has sufficiently addressed an issue,

⁸ ICC-02/05-02/09-162-Anx1.

⁹ ICC-01/04-01/10-356-Anx1.

another defence team may choose not to raise or address a similar issue, thus saving the Court's time and promoting expediency and efficiency of proceedings. Similarly, a witness may touch on some issues in such detail that another defence team may choose not to address those issues during the presentation of its case.

9. The Defence recalls the Chamber's Decision on the Schedule of the Confirmation of Charges Hearing in the *Ruto et al case*¹⁰ setting out the format of the confirmation hearing and respectfully requests that the Chamber departs from the format in that case. The format adopted in the *Ruto et al case* divides the Prosecution and Defence submissions into issues rather than allotting a block of time to each party to present its case. Retaining the format of the *Ruto et al case* in the instant case would lead to unnecessary repetition and duplication of evidence, which would be avoided if the parties are allowed to present the entirety of their case within an allocated block of time.
10. Allocating a block time to each party to present its case in its entirety will also expedite the proceedings and ensure its conduct within the stipulated period of time.¹¹ Expediency may be achieved wherein, for instance, after listening to the presentation of one defence team, another defence team may be in a position to assess its submissions and select and present only matters that were not sufficiently dealt with by the earlier defence team. This in turn would enable the parties to carefully evaluate their case as the proceedings progress and present only evidence and submissions that are not duplicative or repetitive. In these circumstances, allocating a specified time period to each party to present its entire case ensures judicial economy, whilst at the same time preserving the limited scope of the confirmation hearing.

¹⁰ ICC-01/09-01/11-294-Anx-Corr.

¹¹ ICC-01/09-02/11-272, para. 8. The Chamber decided that the Confirmation Hearing shall commence on 21 September 2011 and shall end by no later than 4 October 2011.

Request for a reduction in the length of time for Court Sitzings for Ambassador Muthaura

11. The Defence notes the Chamber's Decision on the Schedule of the Confirmation of Charges Hearing¹² and its annex in which the Chamber decided that morning sessions shall run from 9:30 to 13:00 hours and afternoon sessions shall run from 14:30 to 20:00 hours in the *Ruto et al* case with intermittent thirty minutes breaks after every two hours.¹³ The Defence further recalls the Chamber's Decision on "the Defence Request pursuant to Rule 124(1) for Mr. William Ruto to waive his right to be Present for part of the Confirmation of Charges Hearing" wherein the Chamber rejected the request for Mr. Ruto to be present for part of the hearing.¹⁴

12. Against this background, the Defence respectfully requests that for the reasons contained in Confidential *Ex parte* Annex A appended to this submission, the chamber sit only for a maximum of five (5) hours per day during court sessions. The Defence does not request a waiver of Ambassador Muthaura's right to be present at the hearing pursuant to Rule 124(1), but rather requests the Chamber to grant the request regarding the maximum length of court sitting hours per day to five hours for the reasons detailed in Confidential and *ex parte* Annex A appended to these observations. The Chamber has the inherent powers to regulate the conduct of the proceedings and pursuant to Rule 122(1), the "Presiding Judge shall determine how the hearing is to be conducted [...]." The Defence submits that there is sufficient legal basis to grant the request in this regard and the facts detailed in Annex A, and nature of the case and interests involved, warrant the requested relief.

¹² ICC-01/09-01/11-294.

¹³ ICC-01/09-01/11-294-Anx-Corr.

¹⁴ ICC-01/09-01/11-302, para. 12.

Time Estimates

13. The Defence notifies the Chamber that it shall be relying on audio-video based evidence, geographical maps and visual aids in its presentation at the confirmation hearing. In view of the expanse of evidence it shall be seeking to rely on to respond to the Prosecution's case, the Defence reiterates and adopts its submissions contained herein for the allocation of block time to present its entire case. The allocation of block time will enhance flexibility and will enable the Defence to present its case as it sees fit and in accordance with its strategy.

14. Should the Chamber decide to adopt the format of the *Ruto et al* confirmation hearing, the Defence requests that it be allocated the following times¹⁵ for the effective presentation of its case:

- i. 3 hour to make its opening statement;
- ii. Approximately 1 hour to address the Court on its jurisdictional challenge to supplement its written submission during the concluding phase of the confirmation hearing;
- iii. Approximately 6 hours to make its presentation on the Prosecution evidence relating to the alleged mode of liability of Ambassador Muthaura in this case;
- iv. Approximately 2 hours to view portions of video, geographic maps and other visual aid slides in course of its various presentations;
- v. Approximately, 2 hours to challenge the propriety and scope of the Prosecution's investigations;
- vi. Approximately 4 hours to present evidence on behalf of Ambassador Muthaura;
- vii. A maximum of 10 hours to lead its two *viva voce* witnesses in chief, and an hour for re-examination, should the need arise; and

¹⁵ The Defence is unable at this juncture to give an estimate for the time it will require for the *cross-examination* of witnesses until it is made aware of the identities of the witnesses that will be called by the Kenyatta and Ali Defence teams as well as the proposed scope of these witnesses' testimonies.

- viii. Approximately 4 hours for its closing statement.

Technical Issues relating to the Presentation and Citation of Evidence

15. The Defence notes the Chamber's Decision on the Schedule for the Confirmation of Charges Hearing in the *Ruto et al case* on this matter and urges the Chamber to adopt that portion of the Decision in entirety in the instant case.¹⁶ In particular, the Defence agrees with the direction of the Chamber on the manner of citation of evidence, which requires the parties to provide reference to the EVD number plus the last 4 digits of the document ID number or, at a minimum, their page and paragraph numbers.¹⁷ Similarly, the Defence agrees that when referring to Prosecution witnesses, the parties and participants shall in principle use pseudonyms or witness codes.¹⁸

16. The Defence, however, requests that it be permitted to refer to its own Defence witnesses by their names in public sessions, where the witness has indicated permission for the Defence to do this. The Defence is strongly of the view that the nature of the Defence witnesses and the positions they occupy or have occupied, will help ensure that facts are understood fully by the court, those in the gallery and the public at large – not least by the citizens of Kenya who have the most immediate right to the truth. The Defence emphasises that if the public only hear testimony as being attributed to anonymous Defence witnesses, or by Defence witnesses identified by pseudonym – especially in circumstances where the witnesses are well known public figures of stature and regard, they will not be able to properly follow or understand the import of the evidence being presented on behalf of Ambassador Muthaura. This is made even more acute in

¹⁶ ICC-01/09-02/11-294, paras. 14 to 20.

¹⁷ *Ibid*, para. 14.

¹⁸ *Ibid*, para. 17.

circumstances when such evidence is juxtaposed to the Prosecution anonymous witnesses.

17. The fact that Defence witnesses are willing to put their name to statements and have their account relayed publicly, under their own names, is consistent with the principle of publicity of proceedings,¹⁹ especially when there is no compelling countervailing argument to the contrary.
18. The Defence respectfully underline the importance that it attaches to this issue, especially in circumstances where Ambassador Muthaura has quietly sat for months in the face of an incessant barrage of one-sided innuendo and allegations from the OTP and politically motivated sections of the Kenya press. The Defence submit that Ambassador Muthaura has acted with great restraint, propriety and dignity in seeking to put his defence before the judges of the Pre-Trial Chamber and in not engaging in out-of-court litigation or to answer thoroughly unfounded and unfair allegations through the medium of the press.
19. In these circumstances, the Defence submit that there are compelling reasons to allow the Defence witnesses of Ambassador Muthaura, who so consent, to be publicly named and to be referred to once the confirmation hearing starts. Any restriction in this regard, in circumstances where there is an informed consent from the witness would be disproportionate and unjustified.
20. Certain Defence witnesses who wish their statements to be tendered confidentially can and should be referred to at the hearing by assigned pseudonyms. That said, any blanket order disregarding the wishes of Defence witnesses who are prepared and willing to have their statements made public, would, in the respectful submission of the Defence, be disproportionate and

¹⁹ See, for example, Rome Statute Article 67(1); ECHR, Article 6(1); ICCPR, Article 14(1).

arbitrary. Such restriction would not be “strictly necessary” and their public naming would enhance rather than “prejudice” the interests of justice. Adopting the Defence proposal in this regard will ensure judicial economy, and proper organisation which will help ensure that the proceedings progress in an organised, synthesised and fair manner.

Nature and Scope of Confirmation Hearings

21. The Defence acknowledges that the confirmation hearing is neither a “trial before the trial” nor a “mini-trial.”²⁰ Whilst it is limited in scope and nature, the Defence recalls that Chambers of this Court have stated that the confirmation hearing is designed “to protect the rights of the Defence against wrongful and wholly unfounded charges.”²¹ The suspect is to be presumed innocent²² and the Defence must be given the final word.²³

22. The Defence recalls with concern the Prosecution’s submission in the *Ruto et al case*, wherein it suggested that “the Defence at confirmation may attempt to challenge the legal basis for the charges, and it may offer evidence that might explain the Prosecution’s evidence. But the Chamber should reject attempts by the Defence to offer conflicting or contradictory evidence; conflicts and contradictions instead, should be presented to, and resolved by, the *trier* of fact at trial, since it is both excessive and impractical for the Pre-Trial Chamber to rule on conflicting versions at this preliminary stage in the process.”²⁴ The Prosecution stated further that it “opposes the apparent effort by the Defence to offer *alibi* evidence. *Alibi* or other types of affirmative defences are not appropriate at confirmation; they too are issues to be resolved on a full record at the trial.”²⁵

²⁰ ICC-01/04-01/07-412, p. 4.

²¹ ICC-01/04-01/06-803, at para. 37.

²² ICC-01/04-01/06-T-30-EN, at pp. 10-11, Transcript of Confirmation Hearing, 9 November 2006.

²³ ICC-01/05-01/08-T-9-ENG, at p. 6, Transcript of Confirmation Hearing, 12 January 2009.

²⁴ ICC-01/09-01/11-279, para. 4.

²⁵ ICC-01/09-01/11-279, para. 5.

23. The Prosecution provided no legal basis or authority for its proposition, which should be rejected. A plain reading of Article 61(6) does not support the Prosecution's submission. Rather, Article 61 provides that a suspect may object to the charges, challenge the evidence presented by the Prosecutor and present evidence. Neither the right to challenge evidence presented by the Prosecutor, nor the right to present evidence is limited or circumscribed by the Statute and Rules. Similarly, the Prosecution's submission that *alibi* and other affirmative defences are matters for trial is without merit and should be disregarded. The Prosecution provided no legal basis or authority for its submission. Indeed, the Prosecution submission in this regard are not supported by a plain reading of Rule 79 which does not limit the pleading of *alibi* to the trial stage.

24. Most importantly, the Prosecution's submission completely disregards the order of the Single Judge contained in 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.²⁶ In that Decision, the Single Judge directed that in accordance with Rule 79 of the Rules, "the Defence teams shall notify the Prosecutor of their intention, if any, to raise the existence of an alibi or to raise a ground for excluding criminal responsibility, and to present the evidence on which they intend to rely for either purpose [...]"²⁷ For these reasons, the Prosecution's attempt to muzzle the role of the Defence at the confirmation hearing should be rejected.

Request for Confidentiality

25. The Defence requests that Annex A appended to this submission be received by the Chamber as Confidential and *Ex parte* only available to the Muthaura Defence. The Defence requests this level of classification in order to protect the privacy of

²⁶ ICC-01/09-02/11-64.

²⁷ *Ibid*, para. 22.

the persons named in this annex, in accordance with Article 54(3)(f) of the Statute.²⁸

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'M' followed by a horizontal line.

Dated this 2nd day of September 2011

At Nairobi, Kenya

²⁸ Although Article 54(3)(f) is directed to the Prosecution, the Defence submits that similar considerations apply to the Defence.