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

Date: 3 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
URGENT**

**Defence Application for Adjournment of the Confirmation Hearing or in the
Alternative Extension of Time to File an Amended List of Evidence (LoE)**

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 Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
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Detention Section

Victims Participation and Reparations

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I. INTRODUCTION

1. The confirmation hearing in this case is scheduled to commence on 21 September 2011¹ and to conclude by no later than 4 October 2011.²
2. The Prosecution served its Document Containing the Charges (“DCC”) with the evidence underpinning these new allegations on 19 August 2011³ and an amended DCC on 2 September 2011.⁴ The late disclosure of materially new allegations in the DCC together with the underlying evidence said to support the same unfairly prejudices the fair trial rights of Ambassador Muthaura. The new allegations are substantial in number and significant in nature. They appear to change the substance and direction of the Prosecution’s case in material and important particulars. The Defence has a right to challenge these allegations and has stated its repeated intention to do so.⁵
3. In order for the Defence to mount an effective challenge and present its case in the most efficient manner, reasonable time is required to allow the Defence to properly prepare for the confirmation process. At present, the scheduled confirmation hearing on 21 September 2011 requires the Defence to serve their list of evidence and analysis of the legal charges by 5 September 2011.⁶ The evidence to be served by Ambassador Muthaura on that date will be incomplete because the Defence will not have had sufficient time to adequately investigate and obtain their own evidence to challenge that of the Prosecution at confirmation in respect of the new allegations – a right enshrined in the Rome Statute.⁷

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, para. 8.

³ ICC-01/09-02/11-257-Anx-A. The new allegations are listed in paragraphs 5 and 6 in this application.

⁴ ICC-01/09-02/11-280-AnxA.

⁵ ICC-01/09-02/11-215 among others.

⁶ ICC-01/09-02/11-48 para. 23.

⁷ Article 61(6); Rule 121(6).

4. Accordingly, and for reasons expanded upon in greater detail below, the Defence respectfully requests an adjournment of the confirmation hearing and an order that the 5 September 2011 deadline be vacated as the date on which the Defence must file its list of evidence and witness statements with the Court. Additionally, and/or in the alternative, the Defence requests an extension of time to file an amended list of evidence before the commencement of the confirmation hearing on 21 September 2011. Because of the urgent nature of this application and the imminent deadlines, the Defence file this application as “urgent” and request expedited consideration of the same.

II. NEW ALLEGATIONS ARISING FROM THE DOCUMENT CONTAINING THE CHARGES (“DCC”) SERVED ON 19 AUGUST 2011 AND AMENDED DCC FILED ON 2 SEPTEMBER 2011 OCCASION PREJUDICE TO THE DEFENCE NECESSITATING THE PROVISION OF ADDITIONAL TIME

5. In this section, the Defence sets out the full extent of the new allegations contained in the DCC in so far as it applies to Ambassador Francis Muthaura. In order to assist the Chamber, the Defence undertook a comparative analysis of the allegations contained in the Redacted Article 58 Application⁸, the Decision Issuing Summons to Appear in this case⁹ and the DCC and amended DCC to determine the scope and extent of the new allegations, if any, contained in the original and amended DCCs. The results of this review are set out below and demonstrate an extensive change in direction of the Prosecution’s case. The new allegations identified in the version of the DCC served on 19 August 2011 which are not apparent in the Article 58 application include the following;

⁸ ICC-01/09-02/11-197-Conf-AnxA.

⁹ ICC-01/09-02/11-01.

- a. Regarding the existence of a policy, the Prosecution now allege that the later killings orchestrated by the Kenya Police under Ali's leadership of Mungiki leaders who were directly involved in PEV planning meetings with KENYATTA and other prominent PNU politicians provide material evidence of the same;¹⁰
- b. Police killed Mungiki leaders with knowledge of the involvement of KENYATTA and other PNU politicians in preparatory planning meetings;¹¹
- c. Inclusion of a preparatory meeting on the 30th December 2007;¹²
- d. By the time of the PEV, MUTHAURA had developed close links with the Mungikis through his subordinates;¹³
- e. MUTHAURA once intervened to secure the release of Mungiki from the police prior to the 2007 election;¹⁴
- f. In preparation for the Naivasha attack, MUTHAURA's subordinates provided Administration Police Uniforms to the Mungiki, and another delivered a significant amount of cash to a Mungiki leader;¹⁵
- g. A large sum of money and police uniforms were distributed to the Mungiki from the State House in Nakuru;¹⁶
- h. Mungiki members in Nairobi who had been earmarked to carry out the attacks were mobilized through text messages requesting them to report at specific locations in Nairobi from where they were picked up by Citi Hoppa buses and transported through secret routes to the State House in Nairobi. Upon arrival at the State House, the Mungiki members were addressed by a Mungiki leader in the presence of senior Government officials;¹⁷

¹⁰ ICC-01/09-02/11-257-Anx-A, para. 46, last sentence.

¹¹ *Ibid*, para. 4.9.

¹² *Ibid*, para. 50.

¹³ *Ibid*, para. 53, first sentence.

¹⁴ *Ibid*, para. 53, second sentence.

¹⁵ *Ibid*, para. 55.

¹⁶ *Ibid*, para. 58.

¹⁷ *Ibid*, para. 64.

- i. The Mungiki members were then transported from State House in the backs of military trucks by men wearing Kenyan uniforms. The trucks contained brand new machetes and wooden clubs and were instructed for use on the attack in Naivasha;¹⁸
 - j. As a follow-up to the allegations contained in paragraph 72 of the DCC, the Prosecution alleges that; “The National Security Committee chaired by MUTHAURA did not enforce this request”;¹⁹
 - k. In the same paragraph 73, the Prosecution alleges that; “Indeed there is no evidence even that Kenyan Police followed up on warrants of arrest issued against them”;²⁰
 - l. Through his subordinates, MUTHAURA provided other forms of support including the supply of Administration Police Uniforms and funds;²¹ and
 - m. Finally, the Prosecution migrates all counts contained in its Redacted Article 58 application into the DCC.²²
6. The new allegations identified in the Amended DCC filed on 2 September 2011 include the following;
- a. The Prosecution has now specified the location of the meeting of 30 December 2007 from Nairobi generally to State House, Nairobi;²³
 - b. The Prosecution has also included “Nairobi Members’ Club” as one of the locations that meetings were held on 3rd January 2008, and the word “including” in the context of that paragraph could mean anything and anywhere because it lacks specificity;²⁴

¹⁸ *Ibid*, para. 65.

¹⁹ *Ibid*, para. 73. It constitutes a new allegation in so far as the Prosecutor is alleging that the National Security Committee is the authority to arrest and prosecute offenders in Kenya.

²⁰ *Ibid*, para. 73.

²¹ *Ibid*, para. 81.

²² *Ibid*, pps 38 to 43.

²³ ICC-01/09-02/11-280-AnxA, para. 50.

²⁴ *Ibid*, para. 51.

- c. The Prosecution also stated that “at the Nairobi Members Club on or about 3 January 2008 [...]”.²⁵

7. The evidence underpinning the new allegations contained in both DCCs relies substantially upon the statements of four confidential witnesses. These new allegations together with the evidence underpinning them were disclosed by the Prosecution for the first time on 19 August 2011 and significantly change the substance and direction of the case against Ambassador Muthaura.

III. PREJUDICE TO THE DEFENCE’S INVESTIGATION ARISING OUT OF THE NEW ALLEGATIONS

8. The late disclosure of the new allegations and the new evidence underpinning them significantly prejudices the fair trial rights of Ambassador Muthaura as provided in Article 61(3) and 67(1)(b) of the Rome Statute. Judge Pikis has explained the correlation and interaction between these two pivotal Articles of the Rome Statute stating that the former Article “gives expression” to the latter Article.²⁶ The Defence submit that the safeguards of both Articles must be read into Rule 121(3) and Rule 121(6) of the Rules of Procedure and Evidence. What constitutes “reasonable time” or “adequate time” cannot be determined in the abstract. It must be determined on a case by case basis.²⁷

²⁵ *Ibid*, para. 54.

²⁶ Lubanga, ICC-01/04-01/06, Separate Opinion by Judge Pikis, 14 December 2006, para 5.

²⁷ In relation to the same issue of what constitutes “adequate time” the ICTY has held it is a flexible concept that “begs of a definition outside the particular situation of each case. It is impossible to set a standard of what constitutes adequate time and facilities to prepare a defence because that is something that can be affected by a number of factors including the complexity of the case, and the competing forces and claims at play, such as consideration of the interests of other accused persons.” *Prosecutor v Zejnal Delalic*, IT-96-21-T, Decision on the applications for adjournment of the trial date, 3 February 1997. In relation to the last consideration identified by the Delalic Chamber, the Defence states that it has consulted with the Defence teams of Uhuru Kenyatta and General Hussein Ali and both these teams have consulted with their clients and indicated that they do not oppose the adjournment requested by the Muthaura Defence. In the same vein, the Muthaura Defence supports the adjournment request put forward by the legal teams for both co-suspects in this case.

9. The right to adequate time and facilities is a core right. This entails certain responsibilities for counsel as well. The Human Rights Committee, for example, has explained that:

“If counsel reasonably feel that the time for preparation of the defence is insufficient, it is **incumbent** on them to request the adjournment of the [hearing]. ...There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation is needed.”²⁸

10. In light of the responsibilities entrusted to counsel, underlined by the Human Rights Committee, and considering what can only fairly be described as the late service of core prosecution evidence and the expanded allegations, raised for the first time in the DCC, the Defence states that it would be severely prejudiced if it were forced to proceed to a confirmation hearing on 21 September. The adjournment requested is necessitated by the conduct of the Prosecution and the decisions that office has made. The Prosecution has chosen to disclose core evidence at this eleventh hour in disregard to the concerns expressed by the Defence for Ambassador Muthaura at the initial hearing and its legal obligations as enshrined in the Statute. The Defence attempted to articulate these concerns in the plainest manner at the status conference held on 18 April 2011.²⁹ For convenience, extracts of the same are detailed below:

- a. At page 8, lines 18 to 23: “[...] I think the Bench needs to be alive to the fact that in every single confirmation hearing so far, the date that has been originally set has been vacated. There hasn’t, with the greatest of regret, there hasn’t been a single case where the confirmation date set has been abided to. And in the overwhelming majority of cases, the record discloses that is for one simple reason: Lack of disclosure, lack of timely disclosure by the Office of the Prosecutor.”

²⁸ General Comment No 32, Article 14 : “Right to equality before the courts and tribunals and a fair trial” UN Doc CCPR/C/GC/32, para 32

²⁹ ICC-01/09-02/11-T-2-ENG.

- b. At page 18, lines 14 to 20: "So as a matter of law, your Honour, the position of the Muthaura team is that your Honours must look at the case in hand, the complexity of case, the nature of the allegations and the types of evidence that the Prosecution wish to rely upon. And you cannot be hamstrung or handcuffed to a rigid rule that, in all cases, 30 days before the hearing is consistent with the obligations or consistent with the rights of the suspect to have adequate time and facilities and also a reasonable time before the hearing to get all the evidence."
 - c. Further, the 30-day deadline "is not a licence for the Prosecution to ride rough shod over the Defence Article 67 rights, and also detailed of course in Article 61. [...] [T]hese timely disclosure will depend upon the facts of the case, and it must always be seen through the prism of making the confirmation hearing effective and meaningful"(p. 12, line 22 to p. 13, line 2).
- 11. In short, the timing of the service of these new allegations has prevented the Defence from having adequate, reasonable and sufficient time to investigate these new allegations between the period of service of the evidence on 19 August 2011 and 5 September 2011 when, as matters stand, it is required to submit its list of evidence. Clearly, in these circumstances and given the nature of the new evidence, it would be unreasonable to expect the defence to adequately review, analyse and investigate these significant new allegations within the stipulated time frame. Indeed, despite its best efforts to date, the Defence has not been able to do so.
- 12. There is a further related matter that calls for discussion: 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'³⁰, the Single Judge established three deadlines for the Prosecution to disclose the evidence it intended to rely on at the confirmation hearing.³¹ The Single Judge explained the rationale for imposing the deadlines as follows: "Taking due account of the statutory documents of the Court and with a view to guaranteeing the fairness and expeditiousness of the disclosure proceedings, the Single Judge is of the view that specific deadlines need to be established."³²

13. The first deadline orders the Prosecutor to disclose evidence collected before 15 December 2010 (for which no redaction is required) by 3 June 2011.³³ The second deadline orders the Prosecutor to disclose evidence collected between 15 December 2010 and 31 March 2011 (for which no redaction is required) by 24 June 2011.³⁴ The third and final deadline orders the Prosecutor to disclose evidence collected after the filing of the Admissibility Challenge (for which no redaction is required) by 29 July 2011.³⁵ In relation to evidence for which the Prosecution requested redactions, the Single Judge required that all such *requests* falling within each category above be submitted to her by the deadlines detailed above.³⁶

14. The Defence is left uncertain whether the Prosecution has complied with the deadlines imposed by the Single Judge. From the Defence's review of its various disclosures, the Defence has discovered that on 19 August 2011, the Prosecutor disclosed redacted materials which came into its possession in 2009 and 2010 – in apparent breach of the deadlines imposed by the Single Judge.³⁷

³⁰ ICC-01/09-02/11-64.

³¹ *Ibid*, paras. 16 to 19.

³² *Ibid*, para. 15.

³³ *Ibid*, para. 17.

³⁴ *Ibid*, para. 18.

³⁵ *Ibid*, para. 19.

³⁶ *Ibid*, paras. 17 to 19.

³⁷ 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. For example, witness at KEN-OTP-0043-0002_R01 was disclosed to the Defence on 19 August 2011, whereas the statement itself was signed on

Compliance with the original timelines set by the Single Judge would have provided the Defence with adequate time to prepare its Defence. The late disclosure of evidence which appears to have been in the Prosecution's possession well in advance of the deadlines established by the Single Judge significantly prejudices the fair trial rights of Ambassador Muthaura as provided in Article 67 (1) (b) of the Statute. The timing of the disclosure has prevented the Ambassador from having adequate, reasonable and sufficient time to prepare his case. It is this late disclosure of critical prosecution evidence that necessitates the present application for an adjournment.

15. The Defence further recalls the guidelines for defence interviews set out by the Single Judge in this case wherein the Defence is required to provide the names of prospective witnesses in advance and contact them only when the Victims and Witnesses Unit ("VWU") issues clearance.³⁸ To date, the Defence has presented a total of 297 identified witnesses to VWU and has received clearance in relation to all from the VWU.³⁹ The Defence takes this opportunity to publicly thank VWU for its prompt and efficient assistance. The Defence has not been dilatory and has actively sought to interview witnesses that may assist the Defence, shed light on the Prosecution allegations and enable the Defence to challenge the same. So far, the Defence has interviewed at least 51 witnesses. At least 7 re-interviews are necessary in light of the Prosecution's 19 August disclosure. In addition, thus far, a further 15 new witnesses have been identified that the Defence must seek to interview and, if necessary obtain statements from, in order to effectively challenge the new allegations detailed or otherwise arising from the last tranche of incriminatory prosecution disclosure.

27 September 2010. Similarly KEN-OTP-0005-0484_R01 was disclosed to the Defence on 19 August 2011, but came into the Prosecution's possession in July 2009. The Defence can only assume the Prosecution either failed to comply with the 3 June 2011 deadline for redaction requests with respect to these statements, or, if it met the deadline, it did not expeditiously disclose the statements to the Defence once the redactions had been approved by the Chamber.

³⁸ ICC-01/09-02/11-38, para. 15.

³⁹ The list of potential witnesses submitted by this Defence team is available with the VWU.

16. The limited scope of the confirmation hearing does not limit the number of witness statements that the defence may rely on in the confirmation hearing as long as the evidence is “core” to a party’s case. This position was echoed quite recently by the Single Judge herself. The learned Judge noted that, “Indeed as clearly stated in the order, the reduction of the live witnesses is without prejudice to the rights of the Suspects’ defence teams to rely, for the purposes of the confirmation of charges hearing, upon all written witness statements that are of significance for their respective case.”⁴⁰ For this reason, any suggestion that the limited scope of the hearing should affect the number of witness statements tendered by the Defence in response to the Prosecutor’s allegations are without merit and should be disregarded. Simply put, the Defence is entitled to put core evidence, to the Pre-Trial Chamber, to ensure that it is able to effectively challenge Prosecution allegations. It requires and is entitled under the Statute to adequate time to obtain that core evidence. In the circumstances of the present case, the Defence is not able to do so in accordance with the current time table set by the learned Single Judge, due to the Prosecution’s decision to delay the disclosure of critical information to the eleventh hour. This was foreseeable and the delay occasioned was wholly unnecessary.

REQUEST TO VACATE THE 5 SEPTEMBER 2011 DATE FOR DISCLOSURE OF THE DEFENCE LOE AND / OR REQUEST THAT SUCH EVIDENCE IS NOT TRANSMITTED TO THE PROSECUTION UNTIL THE PRESENT APPLICATION IS DETERMINED

17. The Prosecution submitted its DCC and LoE on 19 August 2011 and its amended DCC yesterday, 2 September 2011. The Defence has been struggling to review this disclosure and conduct additional interviews under very considerable time constraints. In the event that the request in the present application for an adjournment is granted by the filing deadline of 5 September

⁴⁰ ICC-01/09-02/11-275, para. 25

2011 for submitting the Defence List of Evidence and disclosure of underlying evidence to the Prosecution, the Defence respectfully requests the Pre-Trial Chamber to vacate the date and set a new date for the filing of the Defence LoE pursuant to Rule 121(7). In that event, the Defence request that both its list of evidence and the underlying evidence that it will submit to the Registry on 5 September 2011 be retained by the Registry and not communicated to the Prosecution until the present application is determined, and at most 15 days before the confirmation of charges hearing finally set, pursuant to Rule 121(6).

ALTERNATIVE RELIEF: REQUEST FOR EXTENSION OF TIME

18. In the alternative, should the Chamber be minded not to grant the requested relief, the Defence requests that it be granted an extension of time to file an amended list of evidence prior to the commencement of the confirmation hearing on the 21 September 2011. As illustrated above, the allegations for which the Defence seeks further investigations are entirely new and the Defence had no means of establishing their existence prior to their late disclosures in the DCC on 19 August and 2 September 2011. The Defence submits that this fact alone, without more, constitutes good cause to warrant the exercise of discretion in favour of granting the requested extension of time.
19. Chambers of this Court have granted similar requests for extensions of time in the past to the Prosecution. Trial Chamber II, for example, reasoned that; “if the new material is either significantly more compelling than other items of evidence previously disclosed to the defence, or brings to light a previously unknown fact which has a significant bearing on the case and late addition will not cause undue prejudice to the Defence in relation to the latter’s right to have adequate time and facilities to prepare in accordance with Article 67(1)(b) of the Statute.”⁴¹

⁴¹ ICC-01/04-01/07-1552, para. 14.

20. No prejudice will be caused to any of the parties and participants in these proceedings on account of filing an amended list of evidence before 21 September. The Prosecutor, as the triggering force of this case, will not be prejudiced because the evidence to be collected will be strictly limited to responding to the new allegations identified in the original and amended DCC's. As such, no new investigation by the Prosecutor will be warranted. For these reasons, the Defence submits that the factual circumstances detailed herein demonstrate good cause to warrant exercise of discretion in favour of the requested extension in the event that the primary relief detailed in paragraph 22 above is denied.

CONCLUSION

21. For the reasons stated above, the Defence requests that the Chamber grants:
- a. An adjournment of the confirmation hearing for a minimum of eight weeks in order to enable the Defence to effectively respond to new allegations by the Prosecution (the Defence has no objection to the three month adjournment requested by the Kenyatta team)⁴²;
 - b. A new date for filing its list of evidence in accordance with the new date to be scheduled for the adjourned confirmation hearing;
 - c. In the alternative, grant an extension of time to file an amended list of evidence before the commencement of the scheduled hearing on 21 September 2011; and
 - d. In all circumstances, not to allow the Prosecutor to file any further amended DCC or List of Evidence ("LoE").

⁴² ICC-01/09-02/11-281+Conf-Exp-Anxs, para. 27(i)

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'M' or 'W' shape with a horizontal line extending to the right and a small dot at the end.

Dated this 3rd day of September 2011

At Nairobi, Kenya