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**International
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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

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 the Defence Applications for Adjournment
of the Confirmation Hearing and Other Related Requests**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The confirmation hearing in the case of the Prosecution v. Kenyatta, Ali, and Muthaura is due to begin on 21 September 2011. At the last minute, the Defence Team of Uhuru Muigai Kenyatta ("Kenyatta") and Mohammed Hussein Ali ("Ali"), and the Defence Team of Francis Kirimi Muthaura ("Muthaura"), each now seek an extended adjournment of the confirmation hearing.
2. On 2 September 2011, the Defence Team of Kenyatta and Ali submitted an Application for a three month adjournment. On Saturday 3 September 2011, the Prosecution was notified by email of an urgent filing by the Defence Team of Muthaura requesting an adjournment of at least eight weeks and alternatively seeking an extension of time to file an amended LoE. The Prosecution was officially notified of that submission on Monday, 5 September, the day the Defence List of Evidence is due to be submitted.
3. The Prosecution objects to any adjournment of the confirmation hearing or continuance of the time within which to submit the Defence Lists of Evidence. In particular, the Muthaura Defence allegation that the Prosecution failed to comply with the Single Judge's disclosure calendar is blatantly untrue. Nor is there merit to the complaints about late disclosure or claims about substantial new allegations in the disclosure and DCC. To the contrary, the Prosecution submits that the Defence teams have had adequate notice of the content of the allegations against the suspects.

II. BACKGROUND

4. On 19 August 2011, the Prosecution submitted its Document Containing the Charges (DCC), List of Evidence (LoE) and comprehensive In-depth Analysis Chart (IDAC) of evidence included in the LoE.¹
5. On 29 August 2011, the Defence Team of Francis Kirimi Muthaura (“Muthaura”) submitted its “Corrigendum to the 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” wherein it alleged certain defects in the form of the DCC and LoE (the “First Defence Motion”).²
6. On 29 August 2011, the Prosecution submitted its response to the First Defence Motion (the “Prosecution’s Response”).³
7. On 29 August 2011, the Defence Team of Uhuru Muigai Kenyatta (“Kenyatta”) and Mohammed Hussein Ali (“Ali”) submitted the “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” which largely incorporated submissions from the First Defence Motion and requested a status conference to address disclosure of evidence (the “Second Defence Motion”).⁴
8. On 1 September 2011, the Prosecution submitted its response to the Second Defence Motion (the “Prosecution’s Second Response”).⁵

¹ ICC-01/09-02/11-257 and its Annexes.

² ICC-01/09-02/11-268-Corr and Annex.

³ ICC-01/09-02/11-269.

⁴ ICC-01/09-02/11-270 and Annex.

⁵ ICC-01/09-02/11-276 and its Confidential Annex.

9. On 2 September 2011, pursuant to Article 61(4) of the Rome Statute (the “Statute”) and Rule 121(3) and (4) of the Rules of Procedure and Evidence (the “Rules”), the Prosecution submitted an Amended DCC and LoE. Responsive to the Defence complaints, the amended DCC provided more specific details of *previously outlined allegations* based on *already disclosed evidence*. The details relate to the location and date of two meetings that were already referred to in footnotes to the DCC, read in conjunction with the IDAC as submitted on 19 August 2011.
10. On 2 September 2011, the Defence Team of Kenyatta submitted its Application “under Articles 61(3) and 67(1)(a) for an Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alternation to their Selected Viva Voce Witnesses” with confidential *ex parte* Annexes 1 and 2 (the “First Adjournment Application”).⁶ In another submission, the Kenyatta Defence requested the reclassification of the confidential *ex parte* annexes as confidential *inter partes*.⁷ However, as at the time of this submission, these annexes have not been so reclassified.
11. On Saturday 3 September 2011, the Defence Team of Muthaura made its urgent request for an adjournment of the confirmation hearing and alternatively for an extension of time to file an amended LoE. (the “Second Adjournment Request”).⁸

III. SUBMISSIONS

12. The Defence requests for a three-month (by Kenyatta and Ali) and “a minimum of eight weeks” (by Muthaura) adjournment of the confirmation hearing cannot be supported.

⁶ ICC-01/09-02/11-281 and Conf-Exp Annexes.

⁷ ICC-01/09-02/11-283.

⁸ ICC-01/09-02/11-285.

13. At the outset, the Prosecution submits that the Defence requests further reflect their effort to convert the confirmation proceedings into a mini-trial. The Prosecution recalls that the purpose of a hearing for the confirmation of charges “is limited to committing to trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought”.⁹ If the Pre-Trial Chamber finds that the Prosecution's evidence on its face establishes substantial grounds, the trial can go forward. The confirmation hearing is not the forum for the Defence to offer conflicting or contradictory evidence, alibi evidence, or affirmative defences. Those matters are weighed at the trial itself. Additionally, according to Pre-Trial Chamber I in the *Abu Garda* case, “at no point should the Pre-Trial Chambers exceed their mandate by entering into a *premature in-depth analysis* of the guilt of the suspect”¹⁰ (emphasis added). In that context, the Defence’s professed need for substantial additional time in order to interview, re-interview, or assimilate prior interviews of hundreds of witnesses, all of whom contribute “core” evidence to the Defence case, demonstrates either (a) a misunderstanding of the purpose of confirmation or (b) an understanding but an intent nonetheless to conduct a trial on the merits.

14. Nor is there any justification for the last-minute applications. The Defence teams have had ample opportunity to raise the issue of postponement of the confirmation hearing since the fixing of the date for the hearing at the initial appearance of the suspects on 8 April 2011.¹¹ The Single Judge established a disclosure calendar for purposes of the hearing on 20 April 2011.¹² As Muthaura’s Application reminds the Chamber, the Defence made clear from the beginning

⁹ ICC-01/04-01/07-717, para. 63 ; ICC-01/04-01/07-428-Corr, para. 5 ; ICC-02/05-02/09-243-Red, para. 39.

¹⁰ ICC-02/05-02/09-243-Red, para. 40.

¹¹ ICC-01/09-02/11-T-1-ENG, p. 14, lns. 11-13.

¹² ICC-01/09-02/11-64 (« Disclosure Calendar Decision »).

that the Chamber should not anticipate that the confirmation hearing would proceed as scheduled.¹³ Nonetheless, to date, this decision had not been challenged by the Defence teams even though they have been aware for some time of the large volume of evidence expected to be disclosed in the case.¹⁴ Finally, although both Defence teams have been in possession of the last *tranche* of disclosed incriminating evidence since 19 August 2011, they have waited until the last possible moment to file these requests.

15. The Prosecution submits that the Defence last-minute filings are inaccurate in attributing the cause for the requests to late disclosures by the Prosecution. Contrary to the Defence assertion that the Prosecution's disclosure of 19 August 2011 was late, the Prosecution has complied with all deadlines set out in the Rules and the Disclosure Calendar Decision. The Prosecution particularly recalls that the deadlines in that decision were established after "[t]aking due account of the statutory documents of the Court and with a view to guaranteeing the fairness and expeditiousness of the disclosure proceedings".¹⁵

16. Finally, even without regard to the wrongful attribution of cause, there is no merit to the complaints that the Defence needs additional time because of new evidence and new allegations. Both Defence teams complain about insufficient time to review the evidence of "*four confidential witnesses*"¹⁶ and insist they need two to three additional months to prepare. The Prosecution submits that in view of the limited scope of a confirmation hearing and the number and expected professionalism of counsel appearing before the Court, one week is sufficient time

¹³ ICC-01/09-02/11-285, para. 10

¹⁴ See for example, ICC-01/09-02/11-82, paras. 14-16.

¹⁵ ICC-01/09-02/11-64, para. 15.

¹⁶ ICC-01/09-02/11-281, para. 13; ICC-01/09-02/11-285, para. 7.

to review the evidence of the four Prosecution witnesses.¹⁷ The Defence teams have had adequate notice of the substantive allegations against the suspects and cannot now complain of insufficient time to investigate and prepare for the hearing.

17. The Prosecution will now deal with each of the more specific issues raised in the First and Second Adjournment Applications.

The First Adjournment Application—Kenyatta and Ali

18. The First Adjournment Application largely rehashes arguments that were advanced in the Second Defence Motion and have already been addressed in the Prosecution's Second Response¹⁸ For purposes of this response, therefore, the Prosecution incorporates by reference its submissions in paragraphs 6 and 13 to 18 of the Prosecution's Second Response.

19. The Prosecution reiterates that the direction of its case has not changed since the submission of the Article 58 application, contrary to the assertion by the Defence.¹⁹ The allegations contained in the DCC are substantially the same as allegations contained in the confidential redacted version of the Prosecution's Article 58 Application,²⁰ as is amply demonstrated in Annex A to Prosecution's Second Response.²¹

20. The Prosecution does not object to the Defence request to revise its selection of *viva voce* witnesses as long as this is done by 5 September 2011.

¹⁷ In the case of the Muthaura Defence, it appears that their main complaint actually relates to the timing of the disclosure of the statements of one witness. This is discussed below.

¹⁸ ICC-01/09-02/11-276 and Conf Annex A.

¹⁹ ICC-01/09-02/11-281, para. 12.

²⁰ ICC-01/09-02/11-197-Conf-AnxA.

²¹ ICC-01/09-02/11-276-Conf-AnxA.

The Second Adjournment Application--Muthaura

21. The Defence Team of Muthaura similarly alleges “an extensive change in direction of the Prosecution’s case”.²² Again, this assertion is incorrect. Most of the so-called new allegations are no more than detailed explications of allegations already served on the Defence via the first and second public redacted versions and the confidential redacted version of the Article 58 Application.²³ In particular, the Prosecution refers the Chamber to paragraphs 7, 18, 26, 57, 59, 81, 94, 166, 167, 168, 169, 172, 174, 175, 176 and 185 of the confidential redacted version of the Article 58 Application. The allegations contained in these paragraphs broadly track the allegations in the DCC. Moreover, the amended DCC (submitted on 2 September) did not include any new allegations or evidence not previously contained in the original DCC submitted on 19 August 2011. There were some changes, to be sure – the Muthaura Defence complains specifically that the Prosecution identified two locations of previously-alleged meetings – but providing the locations of the meetings did not substantively amend the charges. Instead, in an effort to clarify, the Prosecution added factual details based on the content of disclosed evidence as provided in the IDAC and referenced in the footnotes of the DCC. Even if the addition of further details constitutes an amendment of the charges, the Prosecution recalls the provisions of Article 61(4) of the Statute: “Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given *reasonable notice* before the hearing of any amendment to or withdrawal of charges.” In this case, the requirement of reasonable notice was met since the changes did not

²² ICC-01/09-02/11-285, para. 5.

²³ ICC-01/09-31-Red (15 December 2010); ICC-01/09-31-Red2 (4 April 2011); ICC-01/09-02/11-197-Conf-AnxA (26 July 2011).

involve the introduction of new evidence or material not previously in the possession of the Defence.

22. The Defence also alleges that the Prosecution failed to comply with the Disclosure Calendar Decision when it submitted its “Fourth Communication to the Defence of Redacted Incriminating Evidence Pursuant to Article 61(3)(b)” (the “Fourth Communication”).²⁴ In the procedural history set out in the Fourth Communication, however, the Prosecution referred to the Chamber’s “Fifth Decision on the Prosecutor’s Request for Redactions”,²⁵ a redacted version of which was issued on 19 August 2011.²⁶ The Fifth Decision resolves the allegations raised by the Defence.

23. In paragraph 14 of the Second Adjournment Application, the Muthaura Defence admits that the disclosure of the statements of *one witness* impelled its application for an adjournment.²⁷ The Defence omits, however, that most of the allegations contained in that witness’s statements have long been known to the Defence. They were included in all of the redacted versions of the Article 58 Application. The Prosecution further notes that there are only four documents totalling 102 pages in the concerned package of disclosed evidence. The Muthaura Defence – consisting of at least four experienced lawyers -- cannot reasonably argue that it requires at least eight additional weeks for its team to diligently review the 102 pages comprising the four statements.

²⁴ ICC-01/09-02/11-259-Conf and Conf-Anxs.

²⁵ ICC-01/09-02/11-254-Conf-Exp.

²⁶ ICC-01/09-02/11-254-Conf-Red.

²⁷ ICC-01/09-02/11-285, para. 14: “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.” (Emphasis added).

IV. RELIEF

24. In conclusion, the Prosecution requests that the Chamber dismiss the First and Second Adjournment Applications and deny the relief sought therein.

25. The Prosecution notes that in its attempt to respond to the Applications as expeditiously as possible it has not had the opportunity to review the confidential *ex parte* annexes of the Second Adjournment Application. It therefore reserves the right to provide additional submissions after the reclassification of the said annexes.



Luis Moreno-Ocampo,
Prosecutor

Dated this 5th day of September 2011
At The Hague, The Netherlands