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

Date: 22 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 KENYATTA
AND MOHAMMED HUSSEIN ALI***

PUBLIC

**RESPONSE BY THE DEFENCE ON BEHALF OF UHURU KENYATTA TO THE
“PROSECUTION’S REQUEST TO EXCLUDE CERTAIN DOCUMENTS
SUBMITTED BY THE DEFENCE (21 SEPTEMBER 2011)”**

Source: Defence

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

The Office of the Prosecutor

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Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

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Ogetto
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Steven Kay QC and Gillian Higgins
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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
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**The Office of Public Counsel for the
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States' Representatives

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Registrar

Ms. Silvana Arbia, Registrar

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. PROCEDURAL BACKGROUND

1. On 6 April 2011, the Single Judge issued her “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “First Disclosure Decision”).¹ Within the First Disclosure Decision, the Single Judge recalled Pre-Trial Chamber III’s earlier findings in the 31 July 2008 Decision in which it stressed the significance of providing the Defence with the In-depth Analysis Chart (the “IDAC”).² She also noted that the Defence were to provide an IDAC of their evidence, if they intended to present any, to the Prosecution and the Chamber.³
2. On 20 April 2011, the Single Judge issued her “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”).⁴ In the Second Disclosure Decision, the Single Judge ordered the Defence teams to disclose to the Prosecution any evidence they intend to present at the confirmation hearing and the list of evidence, no later than 5 September 2011.⁵
3. On 5 September 2011, in compliance with Second Disclosure Decision, the Defence disclosed the evidence it intends to rely on at the confirmation hearing,⁶ along with its IDAC,⁷ and List of Evidence.⁸

¹ Pre-Trial Chamber II, Prosecutor v Muthaura., Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48.

² Pre-Trial Chamber II, Prosecutor v Muthaura., Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48, at para 22.

³ Pre-Trial Chamber II, Prosecutor v Muthaura., Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48, at para 23.

⁴ Pre-Trial Chamber II, Prosecutor v Muthaura., 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, 20 April 2011, ICC-01/09-02/11-64.

⁵ Pre-Trial Chamber II, Prosecutor v Muthaura., 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, 20 April 2011, ICC-01/09-02/11-64, at page 13.

⁶ Pre-Trial Chamber II, Prosecutor v Muthaura., Defence First Communication of Pre-Trial Evidence, Pursuant to Rule 78 of the Rules of Procedure and Evidence to the Prosecution, 5 September 2011, ICC-01/09-02/11-295.

4. On 21 September 2011, at 11:17am the Defence received communication from Court Management Services of the “Prosecution’s Request to Exclude Certain Documents Submitted by the Defence” (the “Request to Exclude Evidence”).⁹ The Defence gained access to this filing at 11:33am, just three hours before the commencement of the confirmation of charges hearing. The Prosecution submitted, *inter alia* that:
 - a. The Chamber should exclude items disclosed by the Defence teams but not referred to in their respective IDAC’s;¹⁰
 - b. The Chamber should exclude items disclosed which are, in whole or in part, in a language other than one of the working languages of the Court, but for which no translation is provided;¹¹
 - c. The Chamber should exclude items disclosed by the Defence teams but which are incomplete.¹²
5. The Defence for Mr. Uhuru Kenyatta responds to the Prosecution’s application and hereby addresses each of the relevant sections of evidence.

⁷ Pre-Trial Chamber II, Prosecutor v Muthaura., Defence First Communication of Pre-Trial Evidence, Pursuant to Rule 78 of the Rules of Procedure and Evidence to the Prosecution, 5 September 2011, ICC-01/09-02/11-295-Conf-AnxA.

⁸ Pre-Trial Chamber II, Prosecutor v Muthaura., Defence First Communication of Pre-Trial Evidence, Pursuant to Rule 78 of the Rules of Procedure and Evidence to the Prosecution, 5 September 2011, ICC-01/09-02/11-295-Conf-AnxB.

⁹ Pre-Trial Chamber II, Prosecutor v Muthaura., Prosecution’s Request to Exclude Certain Documents Submitted by the Defence, 21 September 2011, ICC-01/09-02/11-343.

¹⁰ Pre-Trial Chamber II, Prosecutor v Muthaura., Prosecution’s Request to Exclude Certain Documents Submitted by the Defence, 21 September 2011, ICC-01/09-02/11-343 at paras 9 – 12.

¹¹ Pre-Trial Chamber II, Prosecutor v Muthaura., Prosecution’s Request to Exclude Certain Documents Submitted by the Defence, 21 September 2011, ICC-01/09-02/11-343 at paras 13-17.

¹² Pre-Trial Chamber II, Prosecutor v Muthaura., Prosecution’s Request to Exclude Certain Documents Submitted by the Defence, 21 September 2011, ICC-01/09-02/11-343 at paras 18-19.

II. SUBMISSIONS

6. The Defence was notified of the filing of the Request to Exclude Evidence just three hours before the confirmation hearing was due to commence.
7. The Defence disclosure, its list of evidence and IDAC were disclosed on 5 September 2011. The Defence submits that the Prosecution therefore, had 15 days in which to raise any objections.
8. The extremely late filing of the Request to Exclude Evidence can only mean one of the following, either:
 - a. The Prosecution had reviewed the items but demonstrated a complete lack of diligence in not addressing these matters earlier; or
 - b. The decision to file the Request to Exclude Evidence, just three hours before the confirmation hearing was tactical, designed to cause prejudice to the Defence.
9. Pre-Trial Chamber I in the case of Mbarushimana recalled the decision of the Appeal's Chamber in Katanga and Ngudjolo which held that:

“[a] party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right ... The Appeals Chamber agrees with the Trial Chamber's conclusion that parties must submit motions that have repercussions on the conduct of the trial in “a timely manner”. The Appeals Chamber interprets ‘timely manner’ to mean that the parties must act within a reasonable time.”¹³

¹³ Pre-Trial Chamber I, Prosecutor v Mbarushimana, Decision on “Defence request to deny the use of certain incriminating evidence at the confirmation hearing” and the postponement of confirmation hearing, 16 August 2011, ICC-01/04-01/10-378, at para 18.

10. In that particular case, Pre-Trial Chamber I stated that:

“The Chamber notes that the Requests were only filed on 8 August 2011, 9 days before the scheduled commencement of the confirmation hearing, whereas one of the measures sought by the Defence – a ban on the Prosecutor’s use of the evidence affected by the allegedly inadequate disclosure – would substantially disadvantage the Prosecutor in that he would be unable to replace the excluded evidence with other evidence, or otherwise remedy the grievance of the Defence.”¹⁴

11. In this case, the Prosecution’s application if granted, filed just hours before start of the confirmation hearing, would similarly substantially disadvantage the Defence.

A. The IDAC

12. The Prosecution requested that the Defence for Uhuru Kenyatta be prevented from relying on the evidence listed in paragraph 11 of the Request to Exclude Evidence, on the basis that these documents were not included in its IDAC.¹⁵ These items were however included in the list of evidence filed by the Defence on 5 September 2011 as required by the Single Judge.

13. First, the Defence notes that the filing of an IDAC is not a requirement of the Rome Statute (the “Statute”), the Rules of Procedure and Evidence (the “Rules”) or any of the other official text of the Court. The Single Judge decided that the filing of IDACs, as used in the case of Bemba, would be of assistance in the instant case.¹⁶

¹⁴ Pre-Trial Chamber I, Prosecutor v Mbarushimana, Decision on “Defence request to deny the use of certain incriminating evidence at the confirmation hearing” and the postponement of confirmation hearing, 16 August 2011, ICC-01/04-01/10-378, at para 19.

¹⁵ Pre-Trial Chamber II, Prosecutor v Muthaura., Prosecution’s Request to Exclude Certain Documents Submitted by the Defence, 21 September 2011, ICC-01/09-02/11-343 at para 11.

¹⁶ “In the context of the present decision, the Single Judge favours the same approach adopted in the 31 July 2008 Decision”

14. The primary purpose of the IDAC is to assist the Defence in the preparation of the case. Secondly, the IDAC is an aid for the Chamber when organising the presentation of evidence for the hearing:

“The approach advanced in the referenced decisions and reiterated in the present one aims at streamlining the process of evidence disclosure, thus ensuring that the Defence is prepared under satisfactory conditions and that the Presiding Judge is in a position to "organise the presentation of evidence by the parties according to the crimes charged with one party responding to the other on each count consecutively. This prevents any unnecessary delays that might negatively impact upon the commencement of the confirmation hearing on the date envisaged by the Chamber.”¹⁷

15. The Defence stresses that the burden of proof rests with the Prosecution.¹⁸ The Defence has aimed to use the IDAC format to highlight the key areas of its case and to put forward its best evidence. However, as is inevitable when attempting to ‘prove a negative’, not all the Defence evidence fits neatly within the four corners of the IDAC. It is notable that no sanction for non-entry of a piece of evidence into the IDAC framework was ever established by the Single Judge.
16. The Defence reiterates that the intention of the IDAC is an aide, primarily for the Defence and the Chamber. For these reasons, the Defence requests the Pre-Trial Chamber to dismiss the Prosecution’s application under this heading.

¹⁷ Pre-Trial Chamber II, Prosecutor v Muthaura., Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48, at para 24.

¹⁸ Article 67(1)(i) of the Rome Statute.

B. Translations

17. The Prosecution argues that the Chamber should exclude those items which are in whole or in part in a language other than one of the working languages of the Court, but for which no translation is provided.¹⁹
18. The Defence submits that it has exercised due diligence with respect to attempting to obtain translations, and that for this reason, the Court should not exclude any such evidence pursuant to the Prosecutor's request. The fact that the Defence has acted in good faith and with due diligence is evidenced by its contact with the ICC Translation Unit (the "Translation Unit"), the details of which are set out below:
 - a. On 29 August 2011, the Defence sent an email to the Counsel Support Services section (the "CSS") requesting certification from the ICC Translation Unit (the "Translation Unit") for a number of draft translations prepared by the Defence.²⁰
 - b. On 30 August, the CSS sent an email response to the Defence stating that it "had submitted [the Defence's] translation request to the Translation section of the Court." The email continues: "Unfortunately, we have been informed that the section does not work with audio/video files. Also, we have received an official confirmation that your translation request cannot be accommodated this time."²¹
 - c. On 30 August, following receipt of the aforementioned email, the Defence contacted the CSS by telephone to obtain further explanation. The CSS explained that the Translation Unit could not accommodate the Defence request for the following reasons:

¹⁹ Pre-Trial Chamber II, *Prosecution v Muthaura.*, Prosecution's Request to Exclude Certain Documents Submitted by the Defence, 21 September 2011, ICC-01/09-02/11-343 at para 13.

²⁰ See Confidential Annex A, email correspondence between Benjamin Joyes and CSS

²¹ See Confidential Annex B, email correspondence between Benjamin Joyes and CSS

- i. The Translation Unit had no translators available for Swahili to English translation;
 - ii. The Translation Unit had no translators available for Kikuyu to English translation; and
 - iii. The Translation Unit could not translate media files.
 - d. On 30 August, the Case Manager for the Defence of Uhuru Kenyatta, circulated an email to all team members, explaining the content of the telephone conversation referred to in the paragraph above.²²
19. As a result of the response provided by the CSS in paragraph 18, the Defence concluded that the Translation Unit would be unable to (a) certify the Defence's draft translations; or (b) assist with its further requests for translations of audio or video files.
20. The Defence further submits that a significant number of the videos referred to by the Prosecutor (a) contain a mixture of Swahili and English, (b) have been included to illustrate only that Uhuru Kenyatta was present at a given place, (c) can still be relied upon by the Defence as visual aids to illustrate certain aspects of a given event, or (d) already have accompanying defence-prepared draft translations. Therefore the Defence should be permitted to rely on the following documents as described:
- a. KEN-D13-0001-0123: The commentary to this video is in English. In particular, the following statement at 00.21 seconds: "...will not divide them [the voters] along tribal or religious lines";
 - b. KEN-D13-0001-0247: This video shows a comment by Uhuru Kenyatta in English. In particular, the following statement at 00.43: "everything they are discussing, we are in full agreement. We are actually very happy";

²² See Confidential Annex C, email correspondence between Kenyatta Defence Team members.

- c. KEN-D13-0001-0266: This video was submitted for the purpose of showing that Uhuru Kenyatta was outside Harambee House when Raila Odinga and President Kibaki addressed the media on 25 January 2008;
- d. KEN-D13-0001-0267: Once again this video was submitted simply for the purpose of placing Uhuru Kenyatta at a certain place on a given date. In this instance it shows that he was in Parliament on 25 January 2008;
- e. KEN-D13-0001-0287: This video has been uploaded twice (see KEN-D13-0001-0279); there is a translation for this video at KEN-D13-0004-0116;
- f. KEN-D13-0002-0006: The commentary to this video is in English. In particular, the statement that "Raila claims that the government has embarked on a mudslinging campaign against him";
- g. KEN-D13-0002-0007: The commentary to this video is in English. In particular, the statement at 01.08 relating to the Orange Democratic Movement allegations that civil servants are being used in the Party of National Unity election campaign;
- h. KEN-D13-0002-0024: This video shows a comment in English by Raila Odinga. In particular, the following statement at 00.24: "...well the returning officer told me they are printing them at anniversary towers. I hope it will be fast enough...";
- i. KEN-D13-0002-0032: This video shows a comment in English by Raila Odinga: In particular, his call for mass action between 00.00 and 00.32 seconds;
- j. KEN-D13-0002-0099. This video shows a comment in English by Raila Odinga in English. In particular, his comments at the start of the video;

- k. KEN-D13-0005-0177; KEN-D13-0005-0510. These videos contain the same information. They are annexes to two different witnesses' statements. Although the videos contain Swahili, they can be relied upon as visual aids in relation to a youth rally held in Uhuru Park on 25 November 2008;
- l. KEN-D13-0005-0178; KEN-D13-0005-0456: These videos contain the same information. They are annexes to two different witnesses' statements. Although the videos contain Swahili, they can be relied upon as visual aids to in relation to a youth rally held in Uhuru Park on 25 November 2008; and
- m. KEN-D13-0005-0642. This video has been uploaded twice (see KEN-D13-0001-0272); there is a translation for this video at KEN-D13-0004-0025.

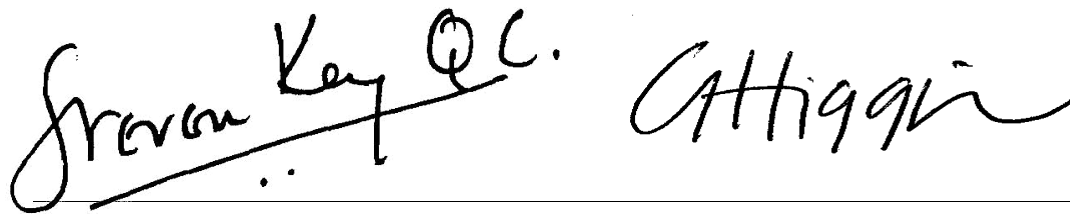
C. Incomplete Documents

- 21. In paragraph 18 of the Request to Exclude Evidence, the Prosecution asserts that a number of documents disclosed by the Defence are incomplete and should therefore be excluded. The Defence submits that the non-inclusion of the information referred to by the Prosecution does not affect the Prosecution's ability to analyse the content of the document in any significant manner. Further, the Defence does not seek to rely on any non-included information. In any event, had the Prosecutor wished to review the missing information, the Defence submits that it should have filed a request with the Chamber in a timely manner.
- 22. In relation to document KEN-D13-0002-0198, the Defence seeks only to rely on the information contained on the first page. The extracts that the Defence deems relevant have been clearly underlined on the first page of the document. The second page can of course be provided, but is of no probative value.

23. In relation to document KEN-D13-0005-0647, the non-inclusion of Annex 6 – which is identified by the witness as “a list of photographs that I had backed up which are relevant to the proceedings concerning Uhuru Kenyatta” – in no way affects the Prosecution’s analysis of the evidence. It appears as the last line of the witness statement and does not add anything of significance to the witness’s evidence. This item is a list of photographs that was not going to be relied on by the Defence and is of background relevance. The list can be provided to the Prosecution.
24. In relation to document KEN-D13-0005-0729, this document is not submitted as a witness statement. It is submitted as incomplete notes as the metadata submitted by the defence indicates. The inclusion or non-inclusion of annexes to this document in no way affects the Prosecution’s ability to analyse its content.

III. CONCLUSION

25. The Defence submits that the Prosecution’s Request to Exclude Evidence was not filed in a timely manner. The Defence has prepared its submissions on the basis that it could rely on the entirety of the evidence contained in the list of evidence at the confirmation hearing. It would therefore be extremely deleterious at this stage for this evidence not to be admitted. The Defence has addressed each of the issues raised by the Prosecution and in turn, requests the Chamber to reject the Prosecution’s motion.



The image shows two handwritten signatures in black ink. The first signature, on the left, is 'Steven Kay QC.' and the second, on the right, is 'G Higgins'. Both signatures are written in a cursive, flowing style. A horizontal line is drawn across the page, passing under the signatures.

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

Dated this, Thursday 22 September 2011

At, The Hague, the Netherlands