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

Date: 01 February 2012

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 Document

**Defence Response to “Prosecution’s Request that the Pre-Trial Chamber
Disregard the ‘Corrigendum to ‘Defence Application for Leave to Appeal the
‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of
the Rome Statute’ ’ (ICC-01/09-02/11-385-Corr + Corr-Anx)”**

Or in the alternative,

**Request for leave to file an amended version of the “Defence Application for
Leave to Appeal the ‘Decision on the Confirmation of Charges Pursuant to Article
61(7)(a) and (b) of the Rome Statute”**

Source: Defence for Francis Kirimi Muthaura

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirimi Muthaura

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Legal Representatives of the Victims

Mr. Morris Anyah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

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I. PROCEDURAL HISTORY

1. On 23 January 2012, Pre-Trial Chamber II (“Chamber”) issued the Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute.¹
2. On 30 January 2012, the Defence of Ambassdor Muthaura (“Defence”) filed the “Defence Application for leave to Appeal the ‘Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute’ (“Application for Leave to Appeal”).²
3. On 30 January 2012 at approximately 18h00, the Defence filed a corrigendum to its Application for Leave to Appeal (“Corrigendum”),³ which was notified to the Chamber and parties and participants on the morning of 31 January 2012.
4. On 31 January 2012, the Prosecution filed its Request that the Pre-Trial Chamber Disregard the “Corrigendum to ‘Defence Application for Leave to Appeal the ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’ ‘(ICC-01/09-02/11-385-Corr + Corr-Anx)’ (“Prosecution Request”),⁴ which was notified to the Chamber, parties and participants on 1 February 2012. The Prosecution submits that the Corrigendum “falls outside the proper scope of a corrigendum as defined by the Appeals Chamber” and “should not be received” by the Chamber.⁵
5. The Defence hereby files its response to the Prosecution Request, and in the alternative, seeks the leave of the Chamber to file an Amended Version of the Application for Leave to Appeal and that the Corrigendum be accepted as this Amended Version.

¹ ICC-01/09-02/11-382-Conf and ICC-01/09-02/11-382-Red.

² ICC-01/09-02/11-385.

³ ICC-01/09-02/11-385-Corr with accompanying explanatory note (ICC-01/09-02/11-385-Corr-Anx).

⁴ ICC-01/09-02/11-389.

⁵ ICC-01/09-02/11-389, para. 6.

II. DEFENCE RESPONSE TO PROSECUTION REQUEST

6. The Defence submits that the type of error that occurred with respect to the Application for Leave to Appeal falls within the purpose and scope of corrigenda. The Appeals Chamber decision⁶ cited by the Prosecution in their Request makes clear that the danger the Appeals Chamber sought to guard against was the use of corrigenda “to circumvent time or page limits stipulated in the legal instruments of the Court or by a Chamber”.⁷
7. No such danger exists with respect to the Corrigendum.⁸ The Corrigendum does not exceed the 20 page limit for leave to appeal applications. Further, as is made clear in the explanatory note annexed to the Corrigendum, the Defence was not attempting to add newly researched and drafted substantive arguments to its Application for Leave to Appeal after the expiration of the deadline for filing such an application.⁹
8. The Defence merely sought to correct the inadvertent deletion of two sentences and a footnote that were finalised and present in the Application for Leave to Appeal prior to their inadvertent deletion. That the paragraph in question is cross-referenced three times in the Application for Leave to Appeal (as set out in the explanatory note to the Corrigendum) underlines that the Defence was in no way attempting to circumvent the procedural rules applicable to leave to appeal applications.
9. Accordingly, the Defence respectfully requests that the Chamber dismiss the Prosecution Request and accept the Corrigendum as properly filed.

⁶ ICC-01/05-01/08-631-Red.

⁷ ICC-01/05-01/08-631-Red, para. 38.

⁸ ICC-01/09-02/11-385-Corr-Anx.

⁹ An affidavit from the Defence Case Manager setting out the circumstances of the filing of the Application for Leave to Appeal and the Corrigendum are attached as public “Annex A”

III. DEFENCE REQUEST FOR LEAVE TO FILE AN AMENDED VERSION OF THE APPLICATION FOR LEAVE TO APPEAL

10. In the alternative, should the Chamber deem the Corrigendum to be improperly filed, the Defence respectfully requests leave to file an Amended Version of the Application for Leave to Appeal and that the Corrigendum be accepted as this Amended Version.
11. The Defence submits that, given the inadvertent nature of the error and the significant impact on the Defence of excluding the paragraph in question from the Application for Leave to Appeal, the interests of justice militate in favour of leave being granted for the filing of an Amended version of the Application for Leave to Appeal that contains the missing paragraph.
12. While the paragraph in question comprises only two sentences and one footnote, it addresses for the fourth issue identified by the Defence in its Application for Leave to Appeal the mandatory third prong of the leave to appeal test under Article 82(1)(d) of the Rome Statute. Further, by way of cross-reference, the paragraph in question likewise addresses the third prong of the leave to appeal test for issues five, six and eight identified in the Application for Leave to Appeal.
13. Accordingly, denying the Defence an opportunity to amend its Application for Leave to Appeal will result in the suspect being unable to make submissions on the mandatory third prong of the leave to appeal test with respect to four out of the eight issues identified in the Application for Leave to Appeal. This great prejudice to the Defence can be contrasted with, what the Defence respectfully submits, is minimal prejudice to the Prosecution, which was notified of the content of the missing paragraph through the Corrigendum on the morning of 31 January, and which has the resources and institutional knowledge to

efficiently and adequately respond to the submissions contained within the inadvertently deleted paragraph.

14. Additionally, the Chamber is entitled to understand and appreciate the submissions being made by the parties before it. The submissions by the Defence, in particular the internal cross-references made at paragraphs 26, 31 and 41 of the Application for Leave to Appeal to “paragraph 23” do not make any sense or convey a totally different meaning unless the correction sought is included in the submissions.
15. Based on the above submissions, and given the Chamber’s overriding duty to regulate the conduct of proceedings before it and ensure justice is done, the Defence respectfully requests leave to file an updated version of the Application for Leave to Appeal and that the Corrigendum be accepted as this updated version.

Respectfully Submitted,



Karim A. A. Khan QC
Lead Counsel for Ambassador Francis K. Muthaura

Dated this 1st Day of February 2012

The Hague, The Netherlands