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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA
AND
UHURU MUIGAI KENYATTA**

PUBLIC

**Defence Submissions on the status conference agenda items contained in the Trial
Chamber's "Order scheduling a status conference" of 14 May 2012**

Source: Counsel for Ambassador 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
Ms. Fatou Bensouda
Ms. Adesola Adeboyejo

Counsel for Francis Kirimi Muthaura

Karim A. A. Khan QC, Essa M. Faal,
Kennedy Ogetto & Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC & Gillian Higgins

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 the Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Ms. Maria Luisa Martinod-Jacombe

Detention Section

**Victims Participation and Reparations Other
Section**

Ms. Fiona McKay

I. Background

1. On 8 April 2011, Ambassador Francis Kirimi Muthaura voluntarily appeared before the Court in response to summonses issued by Pre-Trial Chamber II.¹ The confirmation of charges hearing in this case took place between 21 September 2011 and 5 October 2011. On 23 January 2012, the Pre-Trial Chamber issued its decision confirming the charges, as set out in the decision, preferred by the Prosecutor against Ambassador Muthaura and Mr. Uhuru Kenyatta.²
2. On 29 March 2012, the Presidency constituted Trial Chamber V, and referred the case against Ambassador Muthaura and Mr. Kenyatta to that Trial Chamber. The Presidency transmitted the full record of proceedings before Pre-Trial Chamber II to the newly constituted Chamber, including the Confirmation Decision.³ Judge Kuniko Ozaki was elected Presiding Judge on 26 April 2012.⁴
3. On 14 May 2012, the Trial Chamber issued the "Order scheduling a status conference" ("Order"), which included an agenda for the status conference, and instructed the parties to make written submissions on the listed issues by 28 May 2012.⁵

¹ Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-1.

² "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-02/11-382.

³ "Decision referring the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V", 29 March 2012, ICC-01/09-02/11-414.

⁴ ICC-01/09-02/11-420.

⁵ ICC-01/09-02/11-422.

4. The Defence for Ambassador Muthaura ("the Defence") hereby files its submissions pursuant to the said Order.⁶ The Defence also proposes additional items that it submits should be included in the agenda of the status conference.

II. Defence Submissions on relevant items on the Agenda

(i) Item A: Date of Trial

5. The Defence submits that the Prosecution be ordered to provide full un-redacted disclosure within strict deadlines. The Defence will need adequate time to prepare for trial after the final Prosecution disclosure has been completed. The ability of the Defence to be ready for trial is very largely dependent upon the Prosecution completing its disclosure obligations.
6. The Defence takes this opportunity to underscore that it has grave concerns about the veracity of key prosecution witnesses. This case appears perhaps unprecedented in the extent that certain witnesses appear to be willing to fabricate evidence, in some cases, as part of organised extortion plans, and in other cases simply in the belief that there is money to be made in the ICC process. In these circumstances, it is especially important that the Defence be given sufficient and adequate time after disclosure of the names and identities of prosecution witnesses to fully and thoroughly investigate these witnesses, their reputations, associations and antecedents, as well as the accounts they give allegedly pertaining to the charges. It is in light of this, and so as to prevent undue delay in the trial, that the Defence requests that the

⁶ The Defence notes that at paragraph 5 of the Order the Trial Chamber requests the parties and participants to make "written submissions on their interpretation in law of the mode of individual criminal responsibility applicable to the present case and file such submissions no later than 25 June 2012." The Defence is uncertain as to the scope and content of submissions on this issue the Trial Chamber foresees receiving from the parties and legal representative and respectfully requests that the Chamber clarifies these instructions, perhaps orally during the scheduled Status Conference.

Prosecution be ordered to disclose this information and otherwise complete its disclosure obligations within strict deadlines, as considered appropriate by the Trial Chamber.

(ii) Item B: Languages to be used in the Proceedings

7. Whilst it appears to the Defence that the main languages to be used at trial will be English and Swahili, it is possible that certain witnesses may request to testify in another language. These other languages could possibly include Kikuyu, Luo, Kalenjin, Kamba, Kiisi, and Luhya. There is, of course, a possibility that, during the course of Defence investigations, other witnesses could emerge that may need to testify in a language not included above. Should this eventuality occur, the Defence will provide such information to the Chamber as soon as it becomes clear that provision for testimony in a non-notified language is indeed necessary.

(iii) Item C: Anticipated length of the presentation of evidence at trial

8. The Defence is unable, at this early stage, to predict the length of the presentation of the Defence case. This would depend on the case put forward by the prosecution, the nature of the evidence called by the prosecution and whether the Trial Chamber find a case to answer after the close of the Prosecution case.
9. The Defence would be in a position to make more informed observations on this issue, at the close of the prosecution case, and within a reasonable time prior to the commencement of the Defence case.

(iv) Items D & E: Disclosure Obligations of the Prosecutor pursuant to Rule 76 and Rule 77 of the Rules and Article 67(2) of the Rome Statute

10. The Defence notes that it has not received any disclosure whatsoever from the Prosecution since 21 September 2011.

11. The Order of the Chamber requires all parties to submit their observations on the Agenda by 28 May 2012. Accordingly, at the time of filing, the Defence has not had the advantage of reviewing or addressing the observations of the Prosecution on the issue of disclosure. The Defence anticipates that the Prosecution will address all disclosure issues comprehensively consistent with its obligation under the Statute of the Court and the Rules of Procedure. Accordingly, at this juncture, the Defence will not make any written observations on this issue.

12. The Defence, however, reserves its right to make any further submissions to the Chamber, during the Status Conference on 12 June 2012, regarding the Prosecutor's compliance with his disclosure obligations, in response to the information provided by him with respect to items D, E and G on the Agenda or in relation to any other matter concerning his disclosure obligations which have not been properly addressed or regarding which the Defence considers further guidance or orders from the Trial Chamber may be necessary.

(v) Item H: Whether the Defence intends to advance a defence in accordance with Rules 79 and 80 of the Rules

13. The Defence intends to raise an alibi under Rule 79(1)(a). Material in support of alibi has already been disclosed to the Prosecution during the Pre-Trial stage and elaborated upon during the Confirmation of Charges hearing. The Defence will submit any additional information, not already submitted

during the confirmation hearing, sufficiently in advance of – and at least three weeks⁷ before – the commencement of the trial.

(vi) Item I: Expert Witnesses

14. The Defence informs the Chamber that it has not reached a decision on the matter of expert witnesses or on the issue of joint or separate instruction. Nor has the Defence received any information from the prosecution as to any proposed experts it intends to call or even any areas of proposed expert testimony. The Defence and Prosecution, consequent to the Trial Chamber's Order relating to the present filing, have, however, had very preliminary discussions and will liaise further on this issue and will keep the Trial Chamber informed of developments.

(vii) Item J: Agreements as to evidence pursuant to Rule 69 of the Rules

15. The Defence and Prosecution have recently had very preliminary discussions (albeit in the most general terms) regarding this issue and expressed a willingness to engage further on this issue. The Trial Chamber will be kept informed of developments if and when formal agreements as to evidence, pursuant to Rule 69, are concluded.

(viii) Item K: Time limit for the submission of applications for victim participation

16. As noted by Trial Chamber III, "the preparation of observations on [] applications [to participate as victims in the proceedings] places a heavy burden on the parties."⁸ Accordingly, time limits for the submission of

⁷ *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on disclosure by the defence", 20 March 2008, ICC-01/04-01/06-1235-Corr-Anx1, para 41(b).

⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision setting a timeline for the filing of observations on pending victims' applications", 9 September 2011, ICC-01/05-01/08-1726, para 6.

applications for victim participation should be sufficiently in advance as to allow the Defence time to review the same and to prepare for trial. The Defence respectfully requests that any time limit ordered should be designed to avoid a simultaneous deluge of last minute applications from victims and disclosure by the Prosecution that will prejudice the Defence and hamper effective trial preparation.

17. Similarly, the Defence submits that sufficient time should be provided to the parties to review each set of victims' applications. The Defence wishes to avoid in the present case the situation that arose in the *Bemba* case, wherein the Trial Chamber ordered the Office of Public Counsel for the Defence to assist the Bemba Defence in reviewing the large number of applications submitted within the deadlines set by the Trial Chamber.⁹ The Defence is best placed to investigate and evaluate the applications of individuals seeking to participate as victims in the case and adequate time should be provided to allow it to do so.

(ix) Item L: E-court protocol

18. The Defence requests that the metadata field "Related to Witness" be added to the "Table (potential) evidence and material" of the E-court Protocol. The Defence proposes that when an item of evidence is related to a witness this text field records the name (LAST, First) of the relevant witness, or, if a witness is protected, the ID number assigned by the participant to the witness pursuant to the procedure set out in section 'E' of the E-court Protocol (for example: "KEN-OTP-PPPP-0001").

⁹ ICC-01/05-01/08-1726, para 7.

19. A non-exhaustive list of items that would be considered 'related' to a witness include the statement of a witness, the transcript of a witness's interview, the summary of a witness's statement, the summary of a transcript of a witness's interview and annexes to a witness's statement or record of interview. Statements of a witness taken by a third party, such as a national government or a NGO, would also be considered 'related' to a witness.

20. The purpose of the proposed metadata field is to allow all parties and participants, as well as the Chamber, to immediately identify within the e-court system to which witness, if any, an item of evidence is associated, as well as to make possible the location of all items of evidence associated with a witness. For example, should a party or participant wish to view in e-court the summary of the statement of anonymous Prosecution Witness 6, he or she would need to check the Prosecution's List of Evidence for the specific Document ID of the summary. However, should the "Related to Witness" field be implemented, a party or participant need only search by the witness's ID ("KEN-OTP-PPPP-0006") to locate the summary. Similarly, should a party or participant wish to locate in e-court the 28 interview transcripts of anonymous Prosecution Witness 11, searching the proposed "Related to Witness" field by the value "KEN-OTP-PPPP-0011" would immediately list these statements to the exclusion of all other items of evidence.

21. The Defence submits that the above proposal will add value and functionality to the e-court system as well as allow parties and participants to work in a more efficient manner.

(x) Item M: Objections or observations on the conduct of the proceedings pursuant to Rule 134(2)

22. The Defence makes no observations on this item at present.

(xi) Item N: Whether parties intend to make applications for a legal re-characterisation of the facts under Regulation 55

23. At this stage of the proceedings, the Defence makes no observations on the issue concerning Regulation 55. The Defence however reserves its right to duly respond to any submissions of the Prosecutor and/or the Legal Representatives on this issue that the Defence considers necessary.

(xii) Item O: Site Visit

24. The Defence submits that a site visit would be necessary at the commencement of the Trial. The Defence proposes that such site visit take place after opening statements by the Parties and prior to the commencement of the testimony of the Prosecution's first witness.

(xiii) Item P: Protocol regulating contacts between the parties and protected witnesses called by another party and guidelines on the conditions under which the parties may make reference to the identity of protected witnesses including the fact that they are witnesses during investigations

(a) Contact with Witnesses called by another party

25. The Defence is generally satisfied with the procedure outlined by Trial Chamber ("TC") I in *Lubanga*,¹⁰ TC II in *Katanga*,¹¹ and TC III in *Bemba*,¹² but

¹⁰ "Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses", 3 June 2008, ICC-01/04-01/06-1372, paras 11 and 14.

submits that the procedure will be enhanced with the additional modifications requested below.

26. TC I endorsed its earlier decision and clarified in a subsequent decision concerning contact by the Prosecutor of Defence witnesses that, *“Whenever a request of this kind is made, and if the witness consents to the meeting, the party calling him or her will have to consider the circumstances of the proposed meeting and whether there are any significant adverse security implications; it will have to ensure there are no identifiable issues of concern as regards the individual witness’s mental or emotional stability; and it will need to assess the resource implications of the proposal. It follows there must be close liaison between the party calling the witness, the party seeking the meeting and the VWU, and, on occasion, it may be necessary to ask the Chamber to rule on specific requests, or aspects of them. [...] the prosecution must identify each of the witnesses it seeks to meet; it must suggest in writing dates, times and locations for the interviews; and for those witnesses who agree to participate, contact is to be established through the VWU. A representative of the VWU shall be present during each interview, and the defence may attend (unless the Chamber has ruled otherwise). Depending on the financial implications of any requests that are made, the Registry may have to consider providing additional funding to enable the defence to attend each of these interviews. It is conceivable that this exercise may involve unexpected and significant additional cost on the part of the defence, which is solely due to a request from*

¹¹ “Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’, 26 April 2010, ICC-01/04-01/07-2047-tENG and “Decision on a number of procedural issues raised by the Registry”, 14 May 2009, ICC-01/04-01/07-1134, para 26.

¹² “Redacted Decision on the Prosecution’s Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents”, ICC-01/05-01/08-813-Red, paras 67-68.

the prosecution and which the defence is obliged to meet. Particular difficulties that cannot be resolved through sensible discussions, along with any objections to proposed meetings with particular witnesses, are to be raised with the Chamber (save in situations of emergency) by way of written applications.”¹³

27. In relation to witnesses who are in the ICCP programme, the Defence submits that the procedure set out in the *Gbagbo* case be followed and that VWU be *“the only appropriate channel through which the investigating party may initiate the procedure to contact the other party’s witness benefiting from the ICCPP. Accordingly, should a party wish to interview an ICCPP witness of the other party, it shall contact the VWU which will make the necessary arrangements for the interview to take place.”¹⁴*

28. The Defence agrees with the procedure that witness interviews can take place without a representative of the VWU being present, unless the witness requests the presence of such a representative.¹⁵

29. In order for the Defence to know the proper procedure to be followed, there should be a system devised whereby the Defence is able to obtain information as to whether a witness is in the Court’s ICCP programme or not. The Defence proposes that the first point of contact in relation to its requests to contact and interview any prosecution witnesses should be the VWU to obtain this information.

¹³ *Prosecutor v. Thomas Lubanga Dyilo*, “Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses”, 20 January 2010, ICC-01/04-01/06-2192-Red, paras 50-52.

¹⁴ “Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations”, 6 March 2012, ICC-02/11-01/11-49.

¹⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, “Decision on a number of procedural issues raised by the Registry”, 14 May 2009, ICC-01/04-01/07-1134, para 28.

(b) Use of the names of protected witnesses in investigations

30. The Defence is satisfied with the procedure outlined by TC II in *Katanga*¹⁶ and TC III in *Bemba*.¹⁷ As pointed out by TC II, “it is not so much using the name of a protected witness during investigations that is a risk factor, but rather disclosing the fact that the person is a Court witness.”¹⁸

III. Additional Items the Defence requests be added to the agenda of the Status Conference

31. The Defence requests that the Chamber adds the following items to the agenda of the Status Conference, which are, the Defence respectfully submits, integral to preserving and promoting the fair trial rights of Ambassador Muthaura.

(a) Prosecutor to submit Amended Document Containing Charges

32. The Defence requests that the Prosecutor be ordered to file a fresh Document Containing Charges (DCC) which reflects “the final way in which the Pre-trial Chamber has described them”.¹⁹

33. The Defence submits that the guidelines provided by TC II in *Katanga*²⁰ and TC III in *Bemba*²¹ be applied in this regard.

¹⁶ “Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’”, 26 April 2010, ICC-01/04-01/07-2047-tENG, paras 10-11.

¹⁷ “Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents”, 20 July 2010, ICC-01/05-01/08-813-Red, paras 83-84.

¹⁸ “Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’”, 26 April 2010, ICC-01/04-01/07-2047-tENG, para 10.

¹⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG ET WT, page 13, lines 5 – 10 (referred to in ICC-01/05-01/08-836, para 4).

²⁰ “Decision on the Filing of a Summary of the Charges by the Prosecutor”, 21 October 2009, ICC-01/04-01/07-1547-tENG, paras 10- 29.

34. The Defence requests that the suggestion of TC III in *Bemba*²² be applied in this case, and accordingly that the Prosecution be required, in the DCC, to include footnotes providing appropriate reference to the paragraphs of the Confirmation Decision.

(b) Prosecutor to submit Summary of Presentation of Evidence and In-depth Analysis Chart

35. The Defence requests that, in accordance with the practice of the Court,²³ the Prosecutor be required to serve on the Defence a Summary of Presentation of Evidence which will include, *inter alia*, reference to witnesses it intends to call and the other evidence it intends to rely upon, and that such documents shall explain how the evidence relates to the Charges. The Defence submits that the said summary should be served on it sufficiently in advance of the trial, and within the time-frame set for disclosure of the entirety of the Prosecution evidence.

36. Additionally, the Defence requests that, in line with the established practice of the Trial Chambers,²⁴ the Prosecution be required to submit a detailed chart linking all the incriminating evidence to the factual allegations and the

²¹ "Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges", 20 July 2010, ICC-01/05-01/08-836, paras 29-37.

²² ICC-01/05-01/08-836, para 30.

²³ *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, "Decision regarding the Timing and Manner of Disclosure and the Date of Trial", 9 November 2007, ICC-01/04-01/06-1019, para 26.

²⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, "Decision on the 'Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth -Analysis Chart'", 29 January 2011, ICC-01/05-01/08-682; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, "Decision on the 'Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol' ' and the 'Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E- Court Protocol'", 1 May 2009, ICC-01/04-01/07-1088.

charges in the DCC. The Defence requests that the Prosecution be directed to identify within each piece of evidence, the pertinent passages which are directly relevant to the specific factual allegation. As acknowledged by TC II and TC III, this would go towards ensuring there is no ambiguity in the alleged facts and would additionally provide for the “fair and effective presentation of the evidence the prosecution intends to rely on at trial”.²⁵

37. The Defence is satisfied with the approach proposed by the Prosecution in the *Gbagbo* case, wherein it has “agreed on the format of the In-depth Analysis Chart (“IDAC”) for evidence on which the Prosecution intends to rely at the confirmation hearing. This IDAC will be fact-based, and will include the following information: (a) factual statement, derived from the Document Containing the Charges (“DCC”); (b) document ID or ERN; (c) title of the document; (d) document type; (e) date of the document; (f) relevant excerpts of the document; and (g) elements of the charges to which the document pertains. Annex 2 consists of the agreed IDAC template. Moreover, the Prosecution agreed with the Defence’s proposal to produce an additional element-based chart or list that would identify, for each legal element (including the chapeau elements and the modes of liability), the relevant documents that go to prove that element. Annex 3 consists of the agreed element-based chart or list template.”²⁶

(c) The Prosecutor be required to produce signed witness statements of all witnesses it intends to produce at trial in addition to transcripts

38. The Defence notes the concerns raised by TC II on the burden imposed on the Defence in having to review hundreds of pages of interview transcripts and

²⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, “Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol”, ICC-01/04-01/07-956, para 5; ICC-01/05-01/08-682, para 21.

²⁶ *Prosecutor v. Laurent Gbagbo*, Prosecution Update on Discussions with Defence Regarding Procedures for Disclosure and Redactions, 11 January 2012, ICC-02/11-01/11-25, paras 11-12.

agrees with that Chamber's approach requiring the production of synthesised, signed witness statements: *"However, regarding the transcripts of the two interviews with W-219, the Chamber is concerned about the sheer volume of the information, which exceeds one thousand pages. Even though the Prosecution asserts that the questions dealt with in these interviews are not unfamiliar to the Defence, the Chamber is of the view that it would be unfair to impose upon the Defence the burden of having to analyse such a great mass of new information two months before the start of the trial. Indeed, the Chamber considers that it is an arduous and time-consuming process to identify which parts of the transcripts contain the most pertinent information. The Chamber therefore considers that it is preferable for the Prosecution to produce a signed witness statement, containing a synthesis of what the witness declared during the interview, rather than providing the transcripts of the interview that contain large amounts of unessential information. As the witness will be called to testify in person, it will be the testimony during trial that will be in evidence. It should therefore be sufficient for the Defence to have a signed witness statement in order to prepare for the examination of W-219. However, if the Defence insists on receiving the actual transcripts, it may direct a request to the Chamber to that effect."*²⁷

39. While the general context of the above cited decision was the volume of outstanding disclosure and the short period of time remaining prior to the start of trial, the underlying principle acknowledged by TC II was the "arduous and time-consuming process to identify which parts of the transcripts contain the most pertinent information." A cursory review of aspects of the Prosecution evidence in this case helps demonstrate the practical utility of the suggested policy. The transcript of the interview of OTP

²⁷ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the disclosure of evidentiary material relating to Witness 219", 13 August 2009, ICC-01/04-01/07-1364, paras 16-17 (emphasis added).

Witness 9 run to 314 pages; for OTP Witness 11 this amounts to 418 pages, whilst the transcript record for OTP Witness 12 is 492 pages in length. It is submitted that the Trial Chamber has the authority²⁸ to order that these lengthy interviews be reduced into writing and into a signed statement format by the prosecution pursuant to Article 64(2) and 64(3)(c) of the Rome Statute and that such an Order would enhance the fairness and efficiency of the present proceedings.

(d) The Trial Chamber invite submissions from the Republic of Kenya regarding venue of ICC proceedings

40. The Defence underscores that Ambassador Muthaura will continue to respect and abide by all orders of the Trial Chamber of the ICC regardless of any decision that may be made regarding the issue of venue. The Trial Chamber will be aware, however, that any trial process significantly disrupts the life of an accused person and that such a process, with the stresses attendant to it, can have a detrimental effect on the health of an accused. It is principally for this reason – a desire to reduce disruption and the strain of a criminal trial – that Ambassador Muthaura would continue to prefer that his trial before the ICC takes place in Kenya or else in Arusha, Tanzania (at the premises of the ICTR which is winding down, perhaps). The Defence has previously

²⁸ While the Appeals Chamber has held that the Prosecutor is not obligated to produce signed witness statements pursuant to Rule 111 for interviews that are conducted pursuant to Rule 112, the Appeals Chamber did not limit a Trial Chamber's authority to order the production of such signed, organised and synthesised witness statements pursuant to the Trial Chamber's general powers and obligations under Article 64 to ensure the fairness and expeditiousness of proceedings and order additional disclosure. *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, ICC-02/05-03/09-295 OA2.

supported such a proposal.²⁹ The Statute of the Court clearly anticipates that trials may take place away from the seat of the Court.³⁰

41. It is respectfully submitted that such a proposal could have additional benefits of reducing certain costs – such as those relating to witness travel – increasing Court capacity (given that there are pressures on court room space in the Hague) and that such a proposal may reduce disruption to victims of post- election violence and reduce their travelling time. Aside from these possible benefits, the Trial Chamber may consider that there could be additional advantages of ensuring, if possible, that the judicial process remains in (or close to) the territory concerned. To this end, the Defence requests that the Trial Chamber invite the Government of the Republic of Kenya and/or the Government of the Republic of Tanzania (in so far as the proposal relates to the possibility of an ICC trial held in Arusha) to address it on the feasibility and willingness of hosting the ICC so that the present ICC trial can take place in Kenya or else in Arusha, Tanzania.

Respectfully submitted,



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

Dated this 28th Day of May 2012
London, United Kingdom

²⁹ “Observations of the Defence Team of Ambassador Francis K. Muthaura on the place of the proceedings for the purpose of the confirmation of charges hearing”, 13 June 2011, ICC-01/09-02/11-120.

³⁰ Rome Statute, Article 3(3).