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

Date: 25 April 2012

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF KENYA

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

Public
Request to Make Oral Submissions on Jurisdiction under Rule 156(3)

Source: Defence for Uhuru Muigai Kenyatta
Defence for Francis Kirimi Muthaura

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

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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**

States' Representatives

Amicus Curiae

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Defence for Uhuru Kenyatta (“Kenyatta Defence”) and the Defence for Francis Kirimi Muthaura (the “Muthaura Defence”) request the leave of the Appeals Chamber, pursuant to its inherent discretion under Rule 156(3) of the Rules of Procedure and Evidence (“the Rules”), to make oral submissions in support of the challenge to the jurisdiction of the court as set out in the “Document in Support of Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’” (“Jurisdiction Appeal”), which is presently before the Appeals Chamber.¹
2. The Kenyatta Defence and the Muthaura Defence (collectively “the Defence”), submit that the interests of justice and the fair trial rights of Mr. Kenyatta and Mr. Muthaura require that submissions be made orally in a public hearing on the issue of the jurisdiction of the International Criminal Court (“the Court”).

II. PROCEDURAL BACKGROUND

3. Mr. Kenyatta and Mr. Muthaura appeared voluntarily before the Court at the initial appearance held on 8 April 2011. On 19 September 2011, the Kenyatta Defence filed challenges to the jurisdiction of the Court in the Kenya case.²

¹ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-399, Document in Support of Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 14 February 2012.

² *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-339, Submissions on Jurisdiction on Behalf of Uhuru Kenyatta, 19 September 2011.

4. The Confirmation of Charges Hearing (“Confirmation Hearing”) commenced on 21 September 2011 and lasted for 12 days.
5. The Prosecutor filed a response to the Kenyatta Defence’s challenges against jurisdiction on 14 October 2011.³
6. The Kenyatta Defence filed its “Defence Submissions on behalf of Uhuru Kenyatta Following the Confirmation of Charges Hearing”⁴ on 17 November 2011, in which it reiterated its challenge to the jurisdiction of the court. On 21 November 2011, the Muthaura Defence filed its “Final Written Observations of the Defence Team of Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing”, thereby joining the challenge to the jurisdiction of the court as filed by the Kenyatta Defence.⁵
7. On 23 January 2012, in the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012” (“Confirmation Decision”),⁶ Pre-Trial Chamber II dismissed the Defence challenges by a majority, and determined that the crimes attributed to the Suspects fell within the jurisdiction of the Court.⁷ In his dissenting opinion, His Honour Judge Hans-Peter Kaul stated that the Court “lacks jurisdiction *ratione materiae* in the

³ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-356, Prosecution’s Response to the Defence Challenges to Jurisdiction, 14 October 2011.

⁴ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-372, Defence Submissions on behalf of Uhuru Kenyatta Following the Confirmation of Charges Hearing, 17 November 2011.

⁵ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, Final Written Observations of the Defence Team of Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing, 21 November 2011, see para. 110.

⁶ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-382, Pre-Trial II Chamber, Confidential Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012.

⁷ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-382, Pre-Trial Chamber II, Confidential Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012.

situation in the Republic of Kenya, including in the present case”.⁸ Contrary to the Majority’s findings, he was “not satisfied that the crimes allegedly committed by Mr. Muthaura and Mr. Kenyatta occurred pursuant to or in furtherance of a policy of an *organization* within the meaning of article 7(2)(a) of the Rome Statute” and therefore he was “not satisfied that the crimes charged constitute crimes against humanity as set out in article 7 of the Statute”.⁹

8. On 30 January 2012, the Defence teams for Mr. Kenyatta and Mr. Muthaura filed jointly the notice of “Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute””. The Defence requested *inter alia* that the Trial Chamber not be constituted, if at all, until the appeal has been concluded.¹⁰
9. The Prosecutor filed a consolidated response to the Defence request for suspensive effect on 9 February 2012.¹¹
10. The Kenyatta Defence and the Muthaura Defence filed the substantive Jurisdiction Appeal argument jointly on 14 February 2012, and requested the

⁸ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-382, Pre-Trial Chamber II, Dissenting Opinion by Judge Hans-Peter Kaul, Confidential Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 2.

⁹ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-382, Pre-Trial Chamber II, Dissenting Opinion by Judge Hans-Peter Kaul, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 2.

¹⁰ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-383, Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 30 January 2012.

¹¹ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-398, Prosecution’s Consolidated Response to Mr Muthaura’s and Mr Kenyatta’s Requests for Suspensive Effect of their Appeals on Jurisdiction, 9 February 2012.

Appeals Chamber to declare that the Court does not have jurisdiction in this instance and to reverse the Confirmation Decision.¹²

11. On 29 February 2012, the Appeals Chamber denied the Defence request for suspensive effect.¹³
12. Upon constituting Trial Chamber V on 29 March 2012, the Presidency referred the case against Mr. Kenyatta and Mr. Muthaura.¹⁴
13. The Jurisdiction Appeal is still pending before the Appeals Chamber.

III. RELEVANT LAW

14. The Appeals Chamber's inherent discretion to convene a hearing¹⁵ is set out in Rule 156 (3) of the Rules of Procedure and Evidence, which provides that:

The appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing.¹⁶

15. The Rome statute requires that the ICC shall also apply "general principles of law derived by the Court from national laws of legal systems of the world

¹² *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-399, Document in Support of Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 14 February 2012.

¹³ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-401, Appeals Chamber, Decision on the request of Mr Kenyatta and Mr Muthaura for suspensive effect, 29 February 2012.

¹⁴ *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Decision referring the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V, 29 March 2012.

¹⁵ *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang*, ICC-01/09-01/11 OA, Appeals Chamber, Decision on the "Request for an Oral Hearing Pursuant to Rule 156(3)", 17 August 2011, para. 10.

¹⁶ Rules of Procedure and Evidence, Rule 156(3).

including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”¹⁷

IV. SUBMISSIONS

Cogent Reasons

16. The Defence submits that there are cogent reasons to justify an oral hearing on jurisdiction in this case.¹⁸ The fundamental issue of whether or not the ICC has jurisdiction to try Mr. Kenyatta and Mr. Muthaura must be examined thoroughly in order to ensure the protection of their fair trial rights and to uphold the interests of justice and the integrity of the institution. The Defence submits that an oral hearing will serve to guarantee the public nature of the proceedings, particularly given the intense public interest in this case in Kenya, Africa and the wider international community.¹⁹ Furthermore, there is a clear need to address the Appeals Chamber on the factual/legal matrix in the Jurisdiction Appeal, a matter of fundamental importance in the instant case, and in relation to the future development of international criminal law.²⁰
17. The national legal system of Kenya has a strong tradition of oral argument within its courts that is a feature of its society and accepted as being a valid part

¹⁷ Rome Statute of the International Criminal Court (“Rome Statute”), Article 21(1)(c).

¹⁸ For the Appeals Chamber to exercise its discretion and to depart from this norm it must be furnished with cogent reasons that demonstrate why an oral hearing in lieu of, or in addition to, written submissions is necessary: *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang*, ICC-01/09-01/11 OA, Appeals Chamber, Decision on the “Request for an Oral Hearing Pursuant to Rule 156(3)”, 17 August 2011.

¹⁹ *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang*, ICC-01/09-01/11-246, Government of Kenya, Request for an Oral Hearing Pursuant to Rule 156(3), 3 August 2011.

²⁰ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09, Defence Request for an Oral Hearing, 18 January 2012.

of its procedures for the determination of cases. The Rome Statute forms part of the law of Kenya²¹ and makes provision for the ICC to apply, “general principles of law [...] including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime”.²² Under the Kenyan Constitution of 2010, “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court”.²³ Specifically, the opportunity to be heard on appeal is enshrined in Kenya’s Criminal Procedure Code:²⁴

350. (1) An appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against.

(2) ...the appellant shall not be permitted, **at the hearing of the appeal**, to rely on a ground of appeal other than those set out in the petition of appeal...

352. (1) When the High Court has received the petition and copy under section 350, a judge shall peruse them, and, if he considers that there is no sufficient ground for interfering, may, notwithstanding the provisions of section 359, reject the appeal summarily:

Provided that **no appeal shall be rejected summarily unless the appellant or his advocate has had the opportunity of being heard in support of the appeal**, except –

- (i) in a case falling within subsection (2) of this section;
- (ii) (*Repealed by 5 of 2003. s. 94.*)

²¹ Article 2(6) of the Constitution of Kenya 2010 : “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution. “ The Rome Statute was ratified by Kenya on 15 March 2005.

²² Rome Statute, Article 21(1)(c), as above.

²³ The Constitution of Kenya, 2012, section 50(1). Additionally, section 50(2)(d) states that “Every accused person has the right to a fair trial, which includes the right—to a public trial”. The Constitution also provides for the Kenyan Supreme Court and the Court of Appeal to “hear” appeals – see sections 163(3)(b), 164(3).

²⁴ Laws of Kenya, The Criminal Procedure Code, Chapter 75, sections 350(1) and (2), 352(1), 353 and 354(1).

353. If the High Court does not dismiss the appeal summarily, **it shall cause notice to be given to the appellant or his advocate, and to the respondent or his advocate, of the time and place at which the appeal will be heard,** and shall furnish the respondent or his advocate with a copy of the proceedings and of the grounds of appeal.

354. (1) At the hearing of the appeal the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the respondent or his advocate may then address the court.

18. Given that the Appeals Chamber shall apply the national laws of States that would normally exercise jurisdiction over the crime, the Defence submits that the Chamber must accord proper weight to the relevant provisions of Kenya's Constitution and Criminal Procedure Code in considering the application for an oral hearing. These provisions provide compelling support for the holding of an oral hearing in the instant case.

Possible delay

19. The Defence submits that the granting of an oral hearing will not "delay the consideration of the appeal in contravention of rule 156(4)."²⁵ An oral hearing could be convened without delay in order to complement the ongoing deliberations of the Appeals Chamber, and assist in respect of any issue which may require further clarification. The trial of this matter has not commenced and no delay will be caused by oral argument taking place as part of the appeal.

²⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2582, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010.

*Sufficient opportunity in written submissions*²⁶

20. Notwithstanding the written submissions provided by the Defence challenging the jurisdiction of the Court before the Pre-Trial Chamber,²⁷ and the Appeals Chamber, the Defence has not had an opportunity to expand upon these arguments orally. The Defence submits that although this is a matter within the discretion of the Appeals Chamber an oral hearing is the most effective method of scrutinizing the substantive merits of the parties' submissions. The need to ensure that the matter has been both thoroughly and publicly examined is underscored by the fact that a determination on the issue of jurisdiction may bring these proceedings to an end.

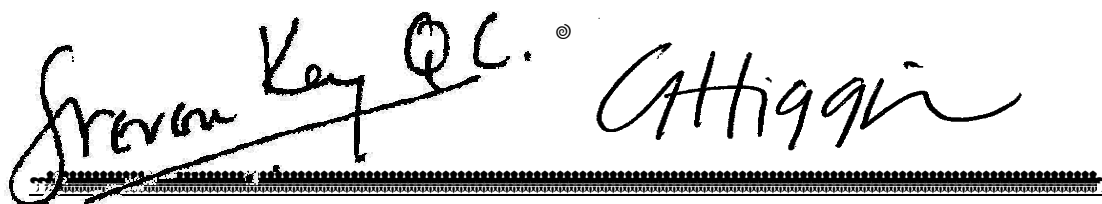
IV. RELIEF

21. For the reasons set out above, the Defence respectfully requests the Appeals Chamber to permit and schedule an oral public hearing on the Jurisdiction Appeal.

²⁶ *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang*, ICC-01/09-01/11 OA, Appeals Chamber, Decision on the "Request for an Oral Hearing Pursuant to Rule 156(3)", 17 August 2011.

²⁷ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, Defence Challenge to Jurisdiction, Admissibility and Prosecution's Failure to Meet the Requirements of Article 54, 19 September 2011; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-372, Defence Submissions on behalf of Uhuru Kenyatta Following the Confirmation of Charges Hearing, 17 November 2011; and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, Final Written Observations of the Defence Team of Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing, 21 November 2011, see para. 110.

Respectfully submitted,

Handwritten signature of Steven Kay QC and Gillian Higgins. The signature is written in black ink and is underlined with a thick, black, dotted line.

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

Handwritten signature of Karim Khan QC. The signature is written in black ink and is underlined with a thick, black, dotted line.

Karim Khan QC
On behalf of Francis Muthaura

Dated this 25 April 2012
The Hague, Netherlands