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

Date: **13 June 2011**

PRE-TRIAL CHAMBER II

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

SITUATION IN KENYA

THE PROSECUTOR

v.

**FRANCIS KIRIMI MUTHAURA
UHURU MUIGAI KENYATTA &
MOHAMMED HUSSEIN ALI**

Public Document

**OBSERVATIONS OF THE DEFENCE TEAM OF AMBASADOR FRANCIS K.
MUTHAURA ON THE PLACE OF THE PROCEEDINGS FOR THE PURPOSE OF
THE CONFIRMATION OF CHARGES HEARING**

Source: Counsel 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

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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Counsel Support Section

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

I. PROCEDURAL HISTORY

1. On 8 March 2011, Pre-Trial Chamber II (the “ Chamber”), by a majority decision, issued summonses for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before the Court on 7 April 2011.¹
2. By a subsequent decision on 18 March 2011, the Chamber set the initial appearance hearing for the Suspects for 8 April 2011.²
3. On 8 April 2011, during the initial appearance, the Chamber decided to hold the confirmation of charges hearing on 21 September 2011.
4. On 3 June 2011, the Chamber requested the parties to submit their observations on the place of the proceedings for the purpose of the confirmation of charges hearing.³
5. The Defence of Ambassador Francis K. Muthaura (“the Defence”) hereby submit their observations:

II. OBSERVATIONS

A. Desirability of conducting the confirmation of charges hearing in Kenya

6. The Defence notes that generally, it is in the interest of justice, the witnesses and the victims to hold trials and thus the confirmation of charges hearing in the territory of the state where the alleged crimes occurred.
7. Conducting the confirmation of charges hearing in the territory of the Republic of Kenya will be convenient for Ambassador Muthaura, members of his family and friends who undoubtedly would like to be around him

¹ Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-01.

² Decision Setting a New Date for the Initial Appearance, ICC-01/09-02/11-8.

³ Decision Requesting Observations on the Place of Proceedings for the Purpose of the Confirmation of Charges Hearing, ICC-01/09-02/11.

during such a period in order to lend him their support. Holding the proceedings in Kenya will also be convenient for the witnesses, victims and members of Kenyan society in general. They would not have to endure the trouble of travelling far to a foreign country to witness or participate in the proceedings.

8. It would also afford the victims, witnesses and members of Kenyan society in general the opportunity to witness live proceedings of the Court on Kenyan issues on Kenyan soil. This will not only give Kenyans ownership of the process, but it would also contribute immeasurably in the fight against impunity in Kenya.
9. Holding the proceedings in Kenya will also enhance the Court's legal processes not only in this but in future cases. For the first time since the establishment of the Court, it will have a unique opportunity to obtain a firsthand view of the *locus in quo* and enable it to better understand the context as well as the unique circumstances in which the alleged crimes occurred. As such, factual and evidentiary assessments and findings to be made by the Court in the upcoming confirmation decision will benefit largely from these direct observations and local understandings of the events under investigation.

B. Feasibility of conducting the confirmation of charges hearing in Kenya

10. While it may be desirable to conduct the confirmation of charges hearing in Kenya, the proposed change of venue is not without potential and, it must be said, significant problems. Firstly the Defence wish to reiterate that it wishes an expeditious process and would not want any change of venue to be used as an excuse to delay the confirmation of charges of hearing currently set for September 2011. Secondly, this case has given rise to sensationalist, sometimes inaccurate, and, from certain sources, clearly partisan political reporting. This factor is intertwined with political interests that may seek to inflame public opinion or to divert it away from the real issues falling for

determination by the PTC. The Defence is alive to the risk that without proper planning and adequate safeguards, conducting a confirmation hearing may give rise to public protests that could risk public order and even escalate to violence. It is trite to say this is something the defence wishes to avoid.

10. Accordingly, unless the Court and the Government of the Republic Kenya are able to adequately provide for the safety and security of the victims and witnesses, and ensure proper and orderly conduct of proceedings, Amb. Francis Muthaura will not support conducting the confirmation of charges proceedings in Kenya.
11. In this regard, Ambassador Muthaura would encourage the Chamber to liaise with the Government of the Republic Kenya and satisfy itself that adequate arrangements are made to ensure the orderly conduct of proceedings in Kenya. Possible safeguards could include consideration of holding proceedings in a military base or other protected zone identified by the Court. It is important that safeguards be put in place to ensure that victims, witnesses, suspects, the Judges and court staff, as well as members of the public do not have to pass the gauntlet of highly charged and organised protesters that could prejudice a fair hearing or which could call into question the fairness of proceedings and the consequent decision of the PTC.
12. The Defence notes with agreement that in accordance with rule 100(1) of the Rules, the Court “may decide to sit in a State other than the host State, in a particular case, where [it] considers that it would be in the interest of justice”.

C. Proposal for alternative venue

13. In this regard, the Defence invites the Chamber, in view of the concerns above, and which are likely to render the conduct of the confirmation hearing proceedings in Kenya not feasible, to consider alternative venues in the sub-region.

14. The Defence proposes Arusha, Republic of Tanzania as an alternative venue for the following reasons:
 - a. Arusha, by reason of its proximity to Kenya (only four hours drive from Nairobi) offers convenience to all Kenyans as they would be able to travel quite easily to Arusha and back for the purpose of participating in and/or observing the proceedings. In this regard, Ambassador Muthaura would also have the benefit of having members of his family and friends available to support him during the process without incurring too much expense.
 - b. Arusha, as the seat of the International Criminal Tribunal for Rwanda ("ICTR") is tried and tested as venue for hosting international courts for nearly two decades and has developed world class facilities for hosting international trials which include *inter alia*: facilities to ensure the delivery of witness testimony, witness protection services as well as the protection of court personnel including Judges and the preservation of court records and evidence. It is understood that this Tribunal is currently winding down its operations. As such some of its facilities may be made available to the ICC for the purpose of conducting the confirmation of charges hearing.
 - c. Additionally, Tanzania in general and Arusha in particular has the experience of hosting high profile cases arising from the region. As such, they have the experience of dealing with media and civil society groups that have interests in trials being conducted in Arusha. It is reasonable to conclude that the Government of Tanzania would not have any significant difficulty in hosting in Arusha the upcoming

confirmation of charges hearing in respect of cases arising from the Kenya Situation.

- d. Arusha is also quite accessible from Europe. It has daily flights from many countries in Europe including the Netherlands. As such, it should not be difficult for Court staff to be able to travel there as and when required.
- e. In view of the fact that the Tribunal in Arusha is winding down, many former staff members of the Tribunal are leaving. This makes accommodation more readily available for all those whose presence is officially required in Arusha for the purpose of the confirmation of charges proceedings.

15. In conclusion, the Defence is of the view that Arusha offers a unique opportunity to bring the proceedings to the Sub-region and closer to the *situ* of the alleged crimes, thus contributing to the principles and objectives of the Rome Statute. Accordingly, it invites the Court to consider Arusha as the next best alternative to Kenya, in view of the concerns raised by the Defence and which may render the conduct of the confirmation of charges hearing in Kenya not feasible.

Respectfully Submitted,



Karim A.A. Khan, QC

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 13th Day of June 2011

At Nairobi, Kenya