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

Date: 25 April 2012

**TRIAL CHAMBER V**

**Before:** Judge Christine Van den Wyngaert  
Judge Kuniko Ozaki  
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**  
**Request to Postpone Setting Trial Date Pending Appeals Chamber's  
Determination of Jurisdiction Appeal**

**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:**

**The Office of the Prosecutor**

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

**Counsel for the Defence**

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**Counsel for Uhuru Muigai Kenyatta**  
Steven Kay QC and 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  
Victims**

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

**States' Representatives**

**Amicus Curiae**

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**REGISTRY**

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**Registrar**

Ms. Silvana Arbia, Registrar

**Deputy Registrar**

Mr. Didier Daniel Pereira, Deputy  
Registrar

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta (the “Kenyatta Defence”) and the Defence for Francis Kirimi Muthaura (the “Muthaura Defence”) hereby request the Trial Chamber to invoke its inherent discretion and exercise its power pursuant to Rule 134(1) of the Rules of Procedure and Evidence (“the Rules”) to postpone the setting of a trial date until the Appeals Chamber has rendered its decision on 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”).<sup>1</sup> The Kenyatta Defence and the Muthaura Defence (collectively “the Defence”) submit that it would be contrary to the interests of justice and the fair trial rights of Mr. Kenyatta and Mr. Muthaura, and an inefficient use of court resources, to set a trial date and commence trial proceedings before the Appeals Chamber has made a final determination as to whether or not the International Criminal Court (“the Court”) has jurisdiction over the present case. This application is made pursuant to Article 4 of the Rome Statute and Rules 134(1), 64(2) and 64(3)(a) of the Rules of Procedure and Evidence.

## II. PROCEDURAL BACKGROUND

2. 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.<sup>2</sup>

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<sup>1</sup> *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.

<sup>2</sup> *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.

3. The Confirmation of Charges Hearing (“Confirmation Hearing”) commenced on 21 September 2011 and lasted for 12 days.
4. The Prosecutor filed a response to the Kenyatta Defence’s challenges against jurisdiction on 14 October 2011.<sup>3</sup>
5. The Kenyatta Defence filed its “Defence Submissions on behalf of Uhuru Kenyatta Following the Confirmation of Charges Hearing”<sup>4</sup> 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.<sup>5</sup>
6. 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”),<sup>6</sup> 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.<sup>7</sup> In his dissenting opinion, His Honour Judge Hans-Peter Kaul stated that the Court “lacks jurisdiction *ratione materiae* in the

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<sup>3</sup> *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.

<sup>4</sup> *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.

<sup>5</sup> *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.

<sup>6</sup> *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.

<sup>7</sup> *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”.<sup>8</sup> 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”.<sup>9</sup>

7. 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.<sup>10</sup> On the same day, the Kenyatta Defence filed its “Defence Application for Leave to Appeal the ‘Decision on the Confirmation of Charges’”,<sup>11</sup> and the Muthaura Defence filed its “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’”.<sup>12</sup>

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<sup>8</sup> *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.

<sup>9</sup> *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.

<sup>10</sup> *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.

<sup>11</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-384, “Defence Application for Leave to Appeal the “Decision on the Confirmation of Charges”, 30 January 2012.

<sup>12</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, 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”, 30 January 2012.

8. The Prosecutor filed the “Prosecution’s Consolidated Response to Uhuru Kenyatta and Francis Muthaura Applications for Leave to Appeal the Decision on the Confirmation of Charges”<sup>13</sup> on 3 February 2012.
9. On 9 February 2012, the Prosecutor filed a consolidated response to the Defence request for suspensive effect,<sup>14</sup> and noted “the exceptional circumstances of the Kenya case”, referring to the fundamental nature of the issue being appealed and the need to implement witness protection measures.<sup>15</sup> In light of these considerations, the Prosecutor submitted that the Presidency or a Trial Chamber might deem it to be in the interests of justice not to commence trial proceedings before the Appeals Chamber makes a final determination on whether the Kenya case falls within the jurisdiction of the Court.<sup>16</sup>
10. The Kenyatta Defence and Muthaura Defence filed the substantive Jurisdiction Appeal argument jointly on 14 February 2012, and requested the Appeals Chamber to declare that the Court does not have jurisdiction in this instance and to reverse the Confirmation Decision.<sup>17</sup>

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<sup>13</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-396, “Prosecution’s Consolidated Response to Uhuru Kenyatta and Francis Muthaura Applications for Leave to Appeal the Decision on the Confirmation of Charges (ICC-01/09-02/11-384-Red and ICC-01/09-02/11-385)”, 3 February 2012.

<sup>14</sup> *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.

<sup>15</sup> *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, para. 4.

<sup>16</sup> *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.

<sup>17</sup> *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.

11. On 29 February 2012, the Appeals Chamber denied the Defence request for suspensive effect.<sup>18</sup> The Appeals Chamber held that granting suspensive effect was not necessary as the implementation of the finding in the Confirmation Decision that the Chamber had jurisdiction with respect to the case would not lead to an irreversible situation that could not be corrected were the Appeals Chamber eventually to find in favour of Mr. Kenyatta and/or Mr. Muthaura, nor could it potentially defeat the purpose of the appeal.<sup>19</sup> Regarding the submission made by the Prosecution that the Defence could either request the Presidency to delay constituting a Trial Chamber or request a constituted Trial Chamber to postpone the commencement of further proceedings, the Appeals Chamber declined to comment on the merits of any such future application, effectively leaving the issue open to consideration by either the Presidency or a constituted Trial Chamber, once seized of such a request.<sup>20</sup>
  
12. On 9 March 2012, Pre-Trial Chamber II rejected the Defence application for leave to appeal the Confirmation Decision in the “Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges”.<sup>21</sup>

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<sup>18</sup> *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.

<sup>19</sup> *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.

<sup>20</sup> *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, para 11

<sup>21</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-406, Pre-Trial Chamber II, Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, 9 March 2012.

13. The Confirmation Decision and the record of proceedings were transmitted to the Presidency on 12 March 2012.<sup>22</sup>
14. On 29 March 2012, the Presidency constituted Trial Chamber V, and referred the case against Mr. Kenyatta and Mr. Muthaura. The Presidency transmitted the full record of proceedings before Pre-Trial Chamber II to the newly constituted Chamber, including the Confirmation Decision.<sup>23</sup>
15. The Jurisdiction Appeal is still pending before the Appeals Chamber.

### III. RELEVANT LAW

16. The Court has an inherent discretion to regulate the proceedings in a fair and expeditious manner. Rule 134(1) of the Rules provides that “Prior to the commencement of the trial, the Trial Chamber on its own motion, or at the request of the Prosecutor or the defence, may rule on any issue concerning the conduct of the proceedings”.<sup>24</sup>
17. Article 4(1) of the Rome Statute establishes that “the Court shall have international legal personality” and shall have “such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes”.<sup>25</sup>

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<sup>22</sup> *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-407, Transmission to the Presidency of the Decision on the Confirmation of Charges and Record of the Proceedings, 12 March 2012.

<sup>23</sup> *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-414, Decision referring the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V, 29 March 2012.

<sup>24</sup> Rules of Procedure and Evidence, Rule 134(1).

<sup>25</sup> Rome Statute of the International Criminal Court (“Rome Statute”), Article 4(1).



18. Article 64(3)(a) of the Statute establishes that the Trial Chamber assigned to deal with the case shall “confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings”.<sup>26</sup>
19. According to Article 64(2), “the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”.<sup>27</sup>

#### IV. SUBMISSIONS

20. The Defence requests the newly constituted Trial Chamber to postpone the setting of a trial date pending resolution of the Jurisdiction Appeal.
21. In the present case, the Defence submits that the interests of justice militate in favour of postponing the setting of a trial date, given the pivotal legal issue at stake, namely the correct legal definition of “organizational policy” within the meaning of Article 7(2)(a) of the Statute. The resolution of this issue by the Appeals Chamber is a fundamental matter, as the impending ruling will determine whether or not the trial will take place. The Appeal challenging the jurisdiction of the court is based upon an entirely valid and justified series of submissions reflective of the Dissenting Opinion of HHJ Kaul in Pre-Trial Chamber II.
22. The Defence also relies upon the argument advanced by the Prosecution in its response in support of the Defence request for suspensive effect,<sup>28</sup> concerning

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<sup>26</sup> Rules of Procedure and Evidence, Rule 64(3)(a).

<sup>27</sup> Rome Statute, Article 64(2).

<sup>28</sup> *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

the approach taken by HHJ Fulford in *Bemba*, following an admissibility challenge by the Defence. HHJ Fulford stated the following:

“Our view is that it is undoubtedly *in the interests of justice for this challenge to be resolved prior to the commencement of the trial itself*. Given that the accused is saying that this case should not be taking place in this court, we are of the view that that issue should be dealt with prior to the commencement of a trial which, it is suggested, should not be taking place. Therefore, in as expeditious a way as possible, we intend to resolve this application prior to the commencement of the trial itself.”<sup>29</sup>

23. The Defence submits that proceeding to set a trial date before the jurisdiction of the Court is confirmed by the Appeals Chamber may result in an inefficient use of both Court and Defence/Prosecution resources concerning the conduct of preparations in the coming months. Furthermore, when considering the interests of justice, both fairness and efficiency militate in favour of postponement of the setting of a trial date until the appeal has been determined. Effective preparation requires a degree of certainty as to whether or not the pending trial will in fact take place. There may also be significant cost implications for the Court and the parties in respect of wasted preparation, should the appeal be determined in favour of Mr. Kenyatta and Mr. Muthaura.
24. The issue of effective preparation and the suspension of proceedings by a Trial Chamber pending determination of an issue before the Appeals Chamber arose in *Lubanga*. In this case, the Trial Chamber issued a decision concerning the interpretation of regulation 55 of the Regulations of the Court, which was appealed by both the Prosecutor and the Defence. Both parties had requested

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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.

<sup>29</sup> *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.

the Appeals Chamber to grant suspensive effect of the decision. The Trial Chamber also requested submissions from the parties as to whether the trial should continue, pending the decision of the Appeals Chamber. The Trial Chamber decided to adjourn the hearing of any evidence until the Appeals Chamber had rendered its decision, for the following reasons:

“The Chamber is persuaded that a necessary precondition for the "effective preparation" of the accused's defence, at this stage in the trial, is that Mr Thomas Lubanga Dyilo should know whether or not the legal characterization of the facts may be subject to change, so as to include the elements of sexual slavery, inhuman treatment and cruel treatment. Additionally, he is entitled to know whether or not any potential modification of the legal characterisation of the facts is to be limited by the facts and circumstances contained in the charges.”<sup>30</sup>

25. The decision of the Chamber was motivated by the fact that the Lubanga Defence should have “certainty” in the preparation of its case, and should not be forced to proceed with a strategy which it might wish to alter in light of the Appeals Chamber’s findings. In line with this reasoning, if a date were to be set for proceedings to commence in the present case before determination of the Jurisdiction Appeal, such an approach would undoubtedly impact upon Mr. Kenyatta and Mr. Muthaura’s entrenched right to adequately prepare their defence, by virtue of the uncertainty of the prospect of a trial. Furthermore, the Defence submits that unless the setting of a trial date is postponed, there may be an ‘appearance’ that the issue on appeal has been pre-determined in a manner which rejects the Defence submissions on jurisdiction. Such an appearance may in turn impact upon the integrity and credibility of the institution.

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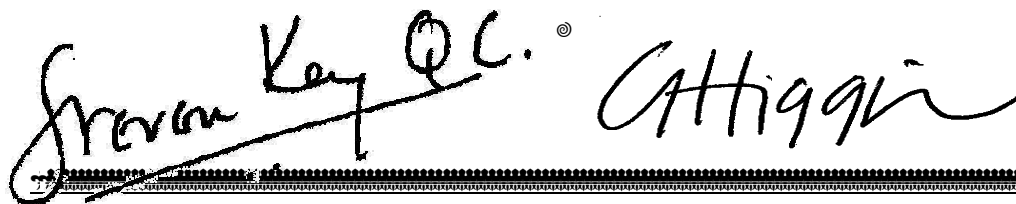
<sup>30</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2143, Trial Chamber I, Public Decision adjourning the evidence in the case and Consideration of regulation 55, 2 October 2009.

26. The Defence submits that as neither Mr. Kenyatta nor Mr. Muthaura are in custody pending appellate resolution of the Jurisdiction Appeal, there is no pressing countervailing interest in respect of the prompt commencement of trial proceedings.

#### **IV. RELIEF**

27. For the reasons set out above, the Defence respectfully requests the Trial Chamber to delay setting a trial date pending the resolution of the Jurisdiction Appeal by the Appeals Chamber.

Respectfully submitted,

The image shows two handwritten signatures in black ink. The first signature, on the left, is 'Steven Kay QC.' followed by a circled 'Q' and a dot. The second signature, on the right, is 'G Higgins'. Both signatures are written in a cursive, flowing style. Below the signatures is a horizontal line with a decorative, dotted pattern.

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

The image shows a single handwritten signature in black ink. The signature is 'Karim Khan QC', written in a cursive, flowing style. Below the signature is a horizontal line with a decorative, dotted pattern.

Karim Khan QC  
On behalf of Francis Muthaura

Dated this 25 April 2012  
The Hague, Netherlands