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

Date: **11 April 2011**

**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**

**Defence Request for Variation of Decision on Summons or in the Alternative  
Request for Leave to Appeal**

**Source:** Defence

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

**The Office of the Prosecutor**

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Ms. Fatou Bensouda, Deputy Prosecutor

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Counsel for Uhuru Muigai Kenyatta:  
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Evans Monari and Gershom Otachi

**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**

**States' Representatives**

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**REGISTRY**

**Registrar**

Ms. Silvana Arbia, Registrar

**Deputy Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## **1. Introduction**

1. The Defence hereby requests the Pre-Trial Chamber to vary the modalities set out in paragraph 15 of the 'Decision on Variation of Summons' (the Impugned Decision) to enable the Defence (and Suspects) to contact potential defence witnesses (who have not been previously interviewed by any other party or participant) and defence witnesses without contacting the Victims and Witnesses Unit in advance, where it is not feasible to do so.
2. In accordance with the principle of equality of arms, the Defence further requests the Pre-Trial Chamber to order that the modalities should also be adhered to by any other parties and participants in the case.
3. In the alternative, the Defence respectfully requests leave to appeal the Impugned Decision in respect of the following issues:
  - a. Whether the Single Judge erred in retaining a condition restricting the rights of the Defence to contact potential witnesses while acknowledging that the suspects have a fundamental right to properly prepare their Defence;
  - b. Whether the modalities set out in paragraph 15 of the Impugned Decision are necessary and proportionate; and
  - c. Whether the imposition of these modalities on the Defence and not the Prosecution or any other participants in the case, violates equality of arms.

## 2. Procedural History

4. On 8 March 2011, the Pre-Trial Chamber issued its 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali'.<sup>1</sup>
  
5. In the Summons Decision, the majority of Pre-Trial Chamber II found that there were reasonable grounds to believe that the Suspects had committed a crime falling under the Rome Statute, and that the issuance of a summons was sufficient to secure their appearance at the initial appearance.
  
6. Without prejudice to further orders on this subject, the Pre-Trial Chamber ordered that the Suspects were:
  - a. to have no contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes for which Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali have been summoned;
  
  - b. to refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence; and
  
  - c. to refrain from committing crime(s) set forth in the Statute; and to attend all required hearings at the International Criminal Court.
  
7. On 4 April 2011, the Single Judge of Pre-Trial Chamber II issued a 'Decision on Variation of Summons Conditions', in which the Single Judge ordered that the Defence should comply with the following modalities:<sup>2</sup>

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<sup>1</sup> ICC-01/09-02/11-01

“the Defence may approach, in principle, any person willing to give his or her account of the events in relation to this case. This consent by the potential witness approached must be given voluntarily and knowingly and any party is prohibited from trying to influence his or her decision as to whether or not to agree to be contacted by the Defence. However, before such contact takes place, the Defence is ordered to communicate the name and necessary contact details to the VWU which, in turn, will advise the Defence on whether this contact may put the person at risk and/or which security arrangements the Defence should obey, if necessary. In case security arrangements need to be set up, the VWU shall be responsible for making the necessary arrangements, in consultation with the Defence. Such advice to the Defence shall be rendered as early as possible, and no later than two weeks as of the day the Defence communicated its intention to contact a particular potential witness to the VWU. In principle, such communication takes place between the Defence and the VWU only, unless the VWU, based on its assessment, is of the view that such contact could lead to a security risk for the person concerned, thus requiring the Single Judge's intervention. In this case, the VWU is instructed to submit immediately a report to the Single Judge, which will, in turn, address this issue in a separate decision.”

8. The Single Judge further ordered that: “any difficulties in the implementation of this decision shall be brought immediately to her attention”.<sup>3</sup>

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<sup>2</sup> ICC-01/09-02/11-38. at para 15.

<sup>3</sup> At para 17.

### 3. Request for reconsideration and variation

9. In accordance with the Single Judge's direction that any difficulties concerning the implementation of the decision should be brought to her attention, the Defence draws her attention to the following practical issues concerning the feasibility of implementing these modalities in connection with all potential witnesses:

- (i) Firstly, it is unclear as to how the Defence can ascertain whether potential witnesses consent to meeting with the Defence, if they are unable to have any contact with them prior to their consultation with the VWU;
- (ii) Secondly, the requirement that the Defence must receive the advice of VWU before it can commence its interview with a particular witness will significantly impede and delay defence investigations;
- (iii) Thirdly, the imposition of these modalities on the Defence and not the Prosecution, procedurally disadvantages the Defence vis-à-vis the Prosecution in terms of its ability to conduct effective and expeditious investigations, and thus violates article 67(1)(e) of the Statute.
- (iv) Fourthly, the mischief attempted to be prevented as the revelation of the identity of prosecution witnesses could be defeated by the very modalities contained in the order.
- (v) Fifthly, the modalities impose a disclosure obligation upon the defence which is not contained within the Rules.

10. The Defence submits that wording of paragraph 17 of the Single Judge's decision clearly implies that the Single Judge may vary these modalities to take into consideration practical difficulties with its implementation. Rule 119(2) of the Rules of Procedure and Evidence further provides that "at the request of the person concerned [...], the Pre-Trial Chamber may at any time decide to amend the conditions set pursuant to sub-rule 1". Trial Chamber I has also recently recognised in the Lubanga case that the Chambers possess an inherent power to vary previous decisions if "they are manifestly unsound and their consequences are manifestly unsatisfactory".<sup>4</sup>

*Obtaining the witness's consent prior to consultation with the VWU*

11. At paragraph 15, the Single Judge held that "the Defence may approach, in principle, any person willing to give his or her account of the events in relation to this case. This consent by the potential witness approached must be given voluntarily and knowingly [...]. However, before such contact takes place, the Defence is ordered to communicate the name and necessary contact details to the VWU [...]".

12. It is unclear from this formulation as to whether the Defence should obtain the consent of the potential witness prior to the referral to the VWU or afterwards. If it is prior to referral, then it is equally unclear as to how the Defence can ascertain whether the person consents, if the Defence is unable to contact the person in question.

13. If the Defence were only required to obtain the consent of the person after it had first obtained the advice of the VWU, this could overburden the VWU with a multitude of unnecessary requests concerning persons, who subsequently indicate they do not wish to be contacted by the Defence. Since the Defence would not be able to assess whether the person would be willing to be interviewed or contacted by the Defence until after they had received the

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<sup>4</sup> Prosecutor v. Lubanga, "Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010", 30 May 2011, ICC-01/04-01/06-2705 at para 18.

advice of the VWU, the Defence investigations would also be stalled in the interim.

14. Many potential defence witnesses will also be persons who are well known to either Counsel or the Suspects. For example, the Defence may wish to call direct family members of the Suspects to testify in connection with character or an alibi defence. It would be completely unfeasible for the Defence or the Suspects to refrain from contacting such persons whilst the Defence obtains the advice of the VWU.
15. Upon communication to the Defence by the VWU that an identified witness was a witness not to be contacted by them, or a protected witness, this would disclose the very issue sought to be concealed from the defence. The mischief sought to be prevented by the modalities would thereby be denied.
16. The Defence therefore respectfully requests that the modalities be varied to enable the Defence to make preliminary contacts with the potential witness, for the purpose of ascertaining whether the person consents to be interviewed by the Defence.

*The requirement that the Defence must receive the advice of VWU before it can commence its interview with a particular witness will significantly impede and delay defence investigation;*

17. The ICC Appeals Chamber has affirmed in Katanga and Ngudjolo that “in principle, the Defence is entitled to contact persons who the Prosecutor either has interviewed or is about to interview prior to their becoming prosecution witnesses and recognises that such persons may have information which is potentially relevant to the Defence.”<sup>5</sup> The Appeals Chamber further held that any incursions upon this right related to protective measures must accord with the principles of necessity and proportionality, and “comply, as far as

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<sup>5</sup> Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" 13 May 2008 ICC-01/04-01/07-476 at para 62.



possible, with the requirements of adversarial proceedings and equality of arms".<sup>6</sup>

18. In terms of the necessity for such an order, the Defence fully understands the concern of the Single Judge to ensure that potential witnesses are not unnecessarily exposed to threats or risks. However, as noted by the Single Judge at paragraph 12 of the Impugned Decision, Counsel are already subject to specific obligations under articles 28 and 29 of the Code of Professional Conduct for Counsel, which enjoin counsel to take due consideration of the security and protection of witnesses and to respect the voluntary nature of their cooperation with the Defence.
19. In this regard, the ICTY Appeals Chamber underscored in the Prlic case that the Chamber should generally presume, absent evidence to the contrary, that defence counsel will act in an appropriate manner.<sup>7</sup> This finding was also upheld by the Special Court for Sierra Leone in the Charles Taylor case.<sup>8</sup>
20. The Defence also acknowledges that the VWU can play a useful role in advising the Defence as to the best practices for approaching vulnerable or sensitive witnesses, who may subsequently require the protection of the Court if they decide to testify. To that end, it may be consistent with Counsel's obligation under article 29 of the Code of Conduct to seek the advice of the VWU in connection with such persons.
21. The Defence nonetheless respectfully contests that it is disproportionate to require the Defence to seek the prior advice of the VWU with respect to each and every potential witness, irrespective of the circumstances of that potential witness.

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<sup>6</sup> At para 63.

<sup>7</sup> Prosecutor v. Prlic et al, 'Decision On Prosecution's Appeal Against Trial Chamber's Order On Contact Between The Accused And Counsel During An Accused's Testimony Pursuant To Rule 85(C)', 5 September 2008, at para 18.

<sup>8</sup> Prosecutor v. Taylor, Decision on Prosecution Motion for an Order Restricting Contact Between the Accused and Defence Counsel During Cross-Examination', 20 November 2009, at page 3.

22. In this regard, in the Lubanga case, the Appeals Chamber overruled a requirement imposed by the Single Judge that the Prosecution was obliged to first seek protective measures from the VWU before filing any request for non-disclosure. The Appeals Chamber found that:

“[t]here is no basis for such a requirement in the Statute, the Rules of Procedure and Evidence, or the Regulations of the Court. Although it may be useful for the Prosecutor in many situations to seek protective measures from the Victims and Witnesses Unit before making a request for non-disclosure to the Pre-Trial Chamber, it would be overly formalistic to require such a prior request to the Victims and Witnesses Unit. In situations where it is clear to the Prosecutor that there is no alternative but to seek non-disclosure of the witness identity, a prior application to the Victims and Witnesses Unit would serve no purpose and potentially could delay the proceedings”.<sup>9</sup>

23. The Defence respectfully submits that this reasoning is equally applicable to situations in which Counsel for the Defence has made a good faith determination under article 29 of the Code of Professional Conduct that contact with a particular person will not result in any security risk or harm to the person in question. To oblige the Defence to consult with the VWU in such a case would unnecessarily and unfairly delay the proceedings.

24. The Defence has a duty to act expeditiously and with diligence, in order to ensure that the defendant's right to an expeditious trial is fully respected. The Defence will not be aware of the full range of persons that they may wish to contact, prior to their investigations as it is often the case that the Defence will be referred to potential witnesses through their discussions with other witnesses. For example, in going to a village to meet one potential witness,

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<sup>9</sup> Prosecutor v. Lubanga, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", ICC-01/04-01/06-568, 13 October 2006 at para 40.

that person may advise the Defence that they should also speak to several other potential witnesses, whom the first person can put them in contact with.

25. If the Defence are required to wait for the response of the VWU each and every time they get a new investigative lead, this could significantly prolong their investigative missions, which can adversely impact on the security of the Defence,<sup>10</sup> and waste defence resources. It could also result in potential witnesses becoming unavailable. This would be the case if the Defence is informed that a potential witness will only be present in a particular village for a limited time period. Accordingly, the modalities as drafted are capable of prejudicing the Defence in their case preparation and opportunity to present evidence to the Court.

26. The Defence may be caused to conduct discrete investigations within a very short time period: for example, if the Prosecution discloses the names of key Prosecution witnesses on or near the final 30 day cut-off period prior to the confirmation hearing, the Defence will only have approximately 15 days within which to finalise any witnesses or exhibits which the Defence wish to rely upon in response to the newly disclosed Prosecution witnesses. Since the VWU is only obliged to respond to Defence inquiries no later than two weeks after they have first received the Defence's communication that they intend to contact a particular witness, full compliance with the modalities set out in the Impugned Decision would mean that the Defence would only have three days within which to conduct its investigations.

27. The Defence therefore respectfully requests the Honourable Single Judge to vary the modalities to provide that:

- (i) Based on the particular circumstances of the person, the Defence must make a good faith assessment as to whether the advice of

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<sup>10</sup> The prolonged presence of Defence investigators in a particular village would draw attention to the Defence, and could rightly or wrongly create the perception that there are many persons in that village who are cooperating with the Defence, and who may be Defence witnesses.

the VWU is necessary to ensure the psychological well-being and safety of the person, whom the Defence intends to interview;

- (ii) When making a preliminary contact with the potential witness for the purpose of ascertaining whether the person consents to be interviewed by the Defence, the Defence shall inquire with the person whether there are any personal well-being or safety issues, which have been referred to the VWU in the past, or which should be referred to the VWU at that juncture; and
- (iii) If the Defence has made a good faith assessment that the advice of the VWU is not necessary with respect to a particular person, and that person has not brought any issues to the attention of the Defence, then the Defence may proceed to interview that person, without first seeking the advice of the VWU;
- (iv) The Defence is obliged to continuously evaluate the security and safety of the person throughout the course of the interview, and to stop the interview and seek the advice of the VWU where necessary, should new information concerning the well-being and safety of the person come to the attention of the Defence.

28. The Defence submits that this proposed variation is consistent with the practice of Trial Chamber II, which has only required the parties to seek the assistance of the VWU in connection with the facilitation of interviews with persons who are particularly vulnerable or whose safety is at risk, or who are already within the witness protection programme.<sup>11</sup>

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<sup>11</sup> Prosecutor v. Katanga and Ngudjolo, 'Décision relative aux modalités de contact entre des victimes représentées et les parties', ICC-01/04-01/07-2571, 23 November 2010 at para 31. Prosecutor v. Katanga and Ngudjolo, Prosecutor v. Katanga, 'Decision on a Number of Procedural Issues Raised by the Registry', 14 May 2009, ICC-01/04-01/07-1134, at paras 26 and 27.

*The imposition of these modalities on the Defence and not the Prosecution, procedurally disadvantages the Defence vis-à-vis the Prosecution*

29. Article 67(1)(e) of the Statute sets out the right of the Defence to obtain the attendance and examination of witnesses under the same conditions as witnesses called by the Prosecution against the Defence. Moreover, as noted at paragraph 15 above, the Appeals Chamber has held that any restrictions of the right of the defence to contact potential witnesses must be consistent with the requirements of adversarial proceedings and equality of arms.<sup>12</sup> The modalities introduced by the Single Judge are a set of steps not provided for in the Rules of the Court.
  
30. As set out at paragraphs 22 to 24, the modalities imposed by the Single Judge will hamper the expeditious execution of defence investigations, and may prevent the defence from interviewing potential witnesses. In contrast, the Prosecution is under no such disadvantage. Whilst the Prosecution is obliged under article 54(3)(f) to take necessary measures to ensure the protection of any person, the Prosecution is not obliged to seek the advice of the VWU with respect to all potential witnesses, irrespective of whether the witness requires the protection of the VWU. The Prosecution has a degree of latitude to balance the operational requirements of effective investigations with the security and wellbeing of its witnesses and sources, and to that end, to use its judgment as to whether the prior advice of the VWU is necessary and appropriate.
  
31. The Impugned Decision also imposes no reciprocal obligations on the Prosecution as concerns their contacts and interviews with persons, who are either potential or actual witnesses for the Defence. In this connection, both Trial Chamber I and II have held that any obligations, which apply to the Defence in connection with their interactions with victims and Prosecution

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<sup>12</sup> Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" 13 May 2008 ICC-01/04-01/07-476

witnesses, apply equally to the Prosecution in equivalent circumstances.<sup>13</sup> The imposition of such judicial directions is particularly warranted in the case of the Prosecution due to the fact that the Prosecutor has not enacted a Code of Conduct, containing provisions such as articles 28 and 29 of the Code of Professional Conduct for Counsel.

32. The Defence therefore respectfully requests, if the conditions are to be maintained against the Defence, the Single Judge order that the same modalities set out in the Impugned Decision should also apply to the Prosecution.

#### **4. Alternative Request for Leave to Appeal**

33. Should the Single Judge reject the Defence request for variation of the modalities set out in the Impugned Decision, the Defence respectfully requests leave to appeal in accordance with article 82(1)(d) of the Statute in connection with the following issues:

- (i) Whether the Single Judge erred in retaining a condition restricting the rights of the Defence to contact potential witnesses while

<sup>13</sup> In the Prosecutor v. Lubanga, Trial Chamber I set out conditions, which were equally applicable to the Prosecution, the Defence and the Legal Representatives of Victims, in terms of the modalities, which they should follow when contacting witnesses, who were being called by the other party ( See Prosecutor v. Lubanga, 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, at para 14).

In Prosecutor v. Katanga and Ngudjolo, both the Prosecution and the Defence were ordered to comply with the modalities, which should be followed if one party wishes to contact a witness, who is being called by the other party. (See Prosecutor v. Katanga, 'Decision on a Number of Procedural Issues Raised by the Registry', 14 May 2009, ICC-01/04-01/07-1134, at paras 27 and 28). In a subsequent decision concerning the relationship between investigations and protective measures, the Chamber underscored that such protocols should be equally applicable to the Prosecution (and the Legal Representatives of Victims).

"14. As regards the Protocol's field of application, the Chamber notes that the Prosecutor considers that he does not have to apply the Protocol during his own investigations since he was not involved in drafting it.<sup>27</sup> However, the Chamber would recall that the purpose of the Protocol is to lay down a set of general guidelines which are to be applied on a case-by-case basis. Moreover, the Legal Representatives of the Victims have undertaken to comply with these good practices. The Chamber considers that the Protocol constitutes a set of minimum rules designed to safeguard the security of all protected witnesses, whether called by the Prosecutor or by the other participants. It is the Chamber's view that, although the Prosecutor is free to adopt practices which offer greater protection during his investigations, he cannot, however, disregard those minimum rules."

(See Prosecutor v. Katanga and Ngudjolo, Decision on the "Protocol on investigations in relation to witnesses benefiting from protective measures" ICC-01/04-01/07-2047 26 April 2010 )

acknowledging that the suspects have a fundamental right to properly prepare their Defence;

- (ii) Whether the modalities set out in paragraph 15 of the Impugned Decision are necessary and proportionate; and
- (iii) Whether the imposition of these modalities on the Defence and not the Prosecution or any other participants in the case, violates equality of arms.

34. Jurisprudence of both Pre-Trial Chambers I and II has been consistent that leave to appeal pursuant to Article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned Decision and which meets the following two cumulative criteria:

- a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>14</sup>

35. The Defence submits that it has met the above conditions as demonstrated below.

*These Issues Arise from the Impugned Decision*

36. In respect of ground (i), the Defence submits that the Single Judge erred in retaining the same condition even after acknowledging that the Defence is entitled to a fundamental right to prepare its case. The Single Judge failed to

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<sup>14</sup> ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4; ICC-01/04-01/07-431, p. 4.

state justification for retaining the stringent condition on the Defence. The Defence submits that the position taken by the Single Judge contradicts the conclusion that the condition shall be retained. The Single Judge finds correctly that there is no property in a witness and either party can approach a witness but fails to set aside the condition that prohibits the Defence from contacting witnesses. This issue arises directly from the Impugned Decision.

37. In respect of ground (ii), the Impugned Decision does not distinguish between the different types of potential witnesses. The Defence is obliged to obtain the prior advice of the VWU with respect to every person who may be a potential witness, irrespective as to whether the person's circumstances warrant such an approach. The Defence also refers to the arguments it set out at paragraphs 17 to 22 *supra*. The issue as to whether such a generic and all-encompassing order is both necessary and proportionate thus arises directly from the Impugned Decision.

38. Although the Chamber cites article 54(1)(b) and 68(1) of the Statute in relation to the Prosecution, the dispositive section of the Impugned Decision is directed solely to the Defence. At the same time, there is no explanation in the Impugned Decision as to why the need for additional safeguards is not equally applicable to the Prosecution's interaction with potential witnesses (who may also be potential Defence witnesses). As argued in paragraphs 29 and 30 *supra*, the imposition of these modalities upon the Defence and not the Prosecution will disadvantage the Defence in terms of its ability to conduct efficient and expeditious investigations. The issue as to whether the imposition of these modalities on the Defence and not the Prosecution or any other participants in the case, violates equality of arms, directly arises from the Impugned Decision.

*These issues affect the fairness of the proceedings*

39. For the reasons set out in paragraphs 23 to 25, and 29 to 30, the Impugned Decision directly affects the right of the Defence under article 67(1)(e) of the



Statute to obtain the attendance and examination of witnesses under the same conditions as witnesses called against the Defence; a right which is intrinsically connected to all three issues. To the extent that the Impugned Decision also impacts upon the efficiency and expeditiousness of Defence investigations, it also affects the right of the Defence under article 67(1)(c) to be tried without undue delay.

*These issues affect the expeditiousness of the proceedings*

40. As set out at paragraphs 21 to 25, the requirement that the Defence consult with the VWU prior to contacting each and every potential witness will fundamentally affect the expedition of defence investigations. This, in turn, will result in the Defence requesting adjournments in the proceedings so that it can process and utilise its investigative findings in an effective manner.

41. At the same time, by burdening the VWU with the obligation to render advice each and every time a defence team contacts a potential witness, the VWU will have less time and resources to process requests for protective measures, which may need to be implemented before the parties can comply with their disclosure obligations. This will clearly affect the ability of the Chamber to maintain the confirmation schedule, and will thus affect the expeditiousness of the proceedings.

*An immediate decision of the Appeals Chamber would materially advance the proceedings*

42. The modalities set out in the Impugned Decision impose significant logistical challenges for the Defence, which can affect the entire manner in which the Defence conducts its case, and in particular, its investigations.

43. The lack of any directives concerning the conduct of the Prosecution vis-à-vis potential Defence witnesses also creates uncertainty as to whether such persons can be approached by the Prosecution, and if so, the applicable

modalities. There are therefore no procedural safeguards with respect to such persons.

44. The Defence therefore submits that in these circumstances, an immediate decision of the Appeals Chamber will rid the judicial process of possible mistakes,<sup>15</sup> “remov[e] doubts concerning the correctness of a decision”,<sup>16</sup> and thereby ensure that the judicial process is not clouded by such doubts and errors.<sup>17</sup>

## 5. Relief Sought

45. For the reasons set out above, the Defence respectfully requests the Honourable Single Judge to vary the modalities imposed at paragraph 15 of the Impugned Decision to provide that:

- I. The Defence may make preliminary contacts with all potential witnesses, for the purpose of ascertaining whether the person in question consents to be interviewed by the Defence;
- II. Based on the particular circumstances of the person, the Defence must make a good faith assessment as to whether the advice of the VWU is necessary to ensure the psychological well-being and safety of the person, whom the Defence intends to interview;
- III. To that end, when making a preliminary contact with the potential witness for the purpose of ascertaining whether the person consents to be interviewed by the Defence, the Defence shall inquire with the person whether there are any personal well-being or safety issues, which have been referred to the

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<sup>15</sup> DRC situation, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, at para 14.

<sup>16</sup> At para 15.

<sup>17</sup> At para 16.

VWU in the past, or which should be referred to the VWU at that juncture.

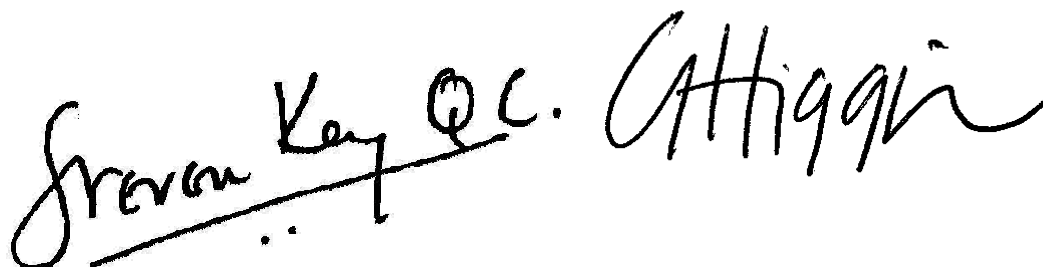
- IV. If the Defence has made a good faith assessment that the advice of the VWU is not necessary with respect to a particular person, and that person has not brought any issues to the attention of the Defence, then the Defence may proceed to interview that person, without first seeking the advice of the VWU;
- V. The Defence is obliged to continuously evaluate the security and safety of the person throughout the course of the interview, and to stop the interview and seek the advice of the VWU where necessary, should new information concerning the well-being and safety of the person come to the attention of the Defence;
- VI. These modalities shall apply *mutatis mutandis* to other parties and participants in the case.

46. In the event that this request for variation of the modalities is rejected, the Defence respectfully requests the Honourable Single Judge to grant the Defence leave to appeal the Impugned Decision in relation to the issues as to:

- (i) Whether the Single Judge erred in retaining a condition restricting the rights of the Defence to contact potential witnesses while acknowledging that the suspects have a fundamental right to properly prepare their Defence;
- (ii) Whether the modalities set out in paragraph 15 of the Impugned Decision are necessary and proportionate; and
- (iii) Whether the imposition of these modalities on the Defence and not the Prosecution or any other participants in the case, violates equality of arms.



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Karim Khan QC  
On behalf of Francis Kirimi Muthaura

Dated this Monday, 11 April 2011  
At The Hague, The Netherlands