



Original: English

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

Date: 1 April 2011

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
THE PROSECUTOR *v.* FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI  
KENYATTA AND MOHAMMED HUSSEIN ALI**

**Public Document**

**Request for Leave to Reply to the "Prosecution Response to Defence Submissions  
on the Variation of Summons Conditions for Francis Kirimi Muthaura, Uhuru  
Muigai Kenyatta and Mohammed Hussein Ali"**

**Source:** Defence

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**

Counsel for Francis Kirimi Muthaura:  
Karim Khan and Kennedy Ogetto  
Counsel for Uhuru Muigai Kenyatta:  
Steven Kay QC and Gillian Higgins  
Counsel for Mohammed Hussein Ali:  
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**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms.SilvanaArbia,

**Deputy Registrar**

Mr. Didier Daniel Preira

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. On 28 March 2011, the Prosecution filed “Prosecution’s Response to the Defence Submissions on the Variation of Summons Conditions for Francis KirimiMuthaura, UhuruMuigi Kenyatta, Muhamed Hussein Ali”.<sup>1</sup>
2. In that filing the Prosecution submitted that the Defence had no automatic standing to submit observations at this stage in the proceedings, as the application by the Prosecution for the summonses was made *ex parte*. It was further argued that no identifiable prejudice arises from the lack of participation of the suspects at this stage as the issue for which they seek intervention can be canvassed and addressed at the initial appearance, which is scheduled to take place on 8 April 2011.
3. Alternatively, it was submitted by the Prosecution that if the Defence were able to intervene in the proceedings at this stage, the rights of the suspects were protected as they had instructed lawyers who were able under Article 67(1)(d) to exercise the rights of investigation and preparation of the defence cases.
4. The Defence seek leave under Regulation 24(5) of the Regulations of the Court to reply to the response by the Prosecution to address the following issues raised by the Prosecution:
  - (a) The Defence have no standing at this stage in the proceedings to make the submission for variation of the terms of conditions attached to the summons;
  - (b) That no discernible prejudice to the accused arises from their lack of participation at this stage; and

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

- (c) That the suspects have their rights sufficiently protected by the fact that their lawyers may contact witnesses and conduct defence preparations on their behalf.

## II. ISSUES TO BE ARGUED

5. The Defence submit that in the “Decision on a Request for Leave to Appeal”,<sup>2</sup> the Pre-Trial Chamber recognised that an individual has *locus standi* to address the Court as soon as the Chamber has rendered a decision on the summons. The Chamber stated:

“[it]...does not consider a person, against whom a summons to appear has been requested as having *locus standi*, nor does it recognize him as a “party” to the proceedings, within the meaning of article 82(1)(d) of the Statute, *until it has taken a decision on the Prosecutor’s applications.*”<sup>3</sup>

6. The Defence submit there is prejudice against the individual suspect, which is not cured by the Prosecution concession that the condition does not include the legal teams for the suspects, because the wide-ranging nature of the originally drafted summonses are capable of interfering with their right to freely associate with family, colleagues and individuals who will be, or may be, their witnesses in the proceedings. Such persons, if they are not Prosecution witnesses, have no conceivable need to be the subject of the restraint envisioned by the Prosecutor. Furthermore, the restriction of contact will represent an unfair restriction and unnecessary interference in the lives of such persons who do not want or need it to be imposed. Internationally recognized human rights of the right to family life, freedom of association are interfered with for no just cause.<sup>4</sup>

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<sup>2</sup> “Decision on a Request for Leave to Appeal”, 11 February 2011, ICC-01/09-43

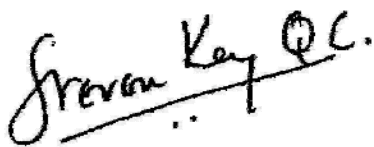
<sup>3</sup> “Decision on a Request for Leave to Appeal”, 11 February 2011, ICC-01/09-43 at para. 9.

<sup>4</sup> International Covenant on Civil and Political Rights, Articles 17, 22.

7. The issues set out in paragraph 4 above constitute new legal and factual issues raised in the Prosecution's response, the correct interpretation of which can have a significant impact on the rights of the suspects and defence preparation. In these circumstances, it is submitted that it would be in the interests of justice for the Defence to be granted leave to reply in order to ensure that the Chamber can reach a decision based upon full consideration of the relevant issues and law. In the event that leave is granted, the Defence is in a position to file the substantive reply forthwith in order to ensure that there is no delay to the Chamber's resolution of these matters.

### III. RELIEF REQUESTED

8. The Defence seek leave under Regulation 24(5) of the Regulations of the Court to reply to the "Prosecution Response to Defence Submissions on the Variation of Summons Conditions for Francis KirimiMuthaura, UhuruMuigai Kenyatta and Mohammed Hussein Ali".



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Steven Kay QC and Gillian Higgins  
On behalf of UhuruMuigai Kenyatta



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Karim A. A. Khan  
On behalf of Francis KirimiMuthaura



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Evans Monari and Gershom Otachi  
On behalf of Mohammed Hussein Ali

Dated this Friday, 1 April 2011

At London, England