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

Date: 20 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

**REQUEST FOR LEAVE TO REPLY TO THE "PROSECUTION'S RESPONSE TO
DEFENCE REQUEST FOR VARIATION OF DECISION ON SUMMONS OR IN
THE ALTERNATIVE LEAVE TO APPEAL"**

Source: Defence

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

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Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

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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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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

INTRODUCTION

1. The Defence seek leave under Regulation 24(5) of the Regulations of the Court to reply to the “Prosecution’s Response to Defence Request for Variation of Decision on Summons or in the Alternative Leave to Appeal” filed on 15 April 2011 (“Prosecution’s Response”).¹

II. PROCEDURAL BACKGROUND

2. On 4 April 2011, the Single Judge of Pre Trial Chamber II (“Single Judge”) issued the “Decision on Variation of Summons Conditions” (“Decision”).² The Decision requires, *inter alia*, that the Defence consult with the Victims and Witnesses Unit (“VWU”) for its advice on potential security issues before it contacts potential Defence witnesses, and it bars the Defence from contacting potential witnesses unless they have consented to be contacted.
3. On 11 April 2011, the Defence filed the “Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal” (“Defence Request”).³
4. On 15 April 2011, the Prosecution filed the “Prosecution’s Response to Defence Request for Variation of Decision on Summons or in the Alternative Leave to Appeal”.⁴

¹ Prosecutor v. Muthaura et al, “Prosecution’s Response to ‘Defence Request for Variation of Decision on Summons or in the Alternative Leave to Appeal’”, 15 April 2011, ICC-01/09-02/11-59.

² Prosecutor v. Muthaura et al, “Decision on Variation of Summons Conditions”, 4 April 2011, ICC-01/09-02/11-38.

³ Prosecutor v. Muthaura et al, “Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal”, 11 April 2011, ICC-01/09-02/11-52.

⁴ Prosecutor v. Muthaura et al, “Prosecution’s Response to ‘Defence Request for Variation of Decision on Summons or in the Alternative Leave to Appeal’”, 15 April 2011, ICC-01/09-02/11-59.

III. ISSUES TO BE ADDRESSED

5. The Defence seek leave to address the following issues:

- (a) At paragraph 11 of the Prosecution's Response, the Prosecution alleged that the regime proposed by the Single Judge "works with respect to Prosecution witnesses, and it is also applied in other cases for Defence witnesses." This assertion is incorrect and cannot be relied upon by the Pre-Trial Chamber. In support of its argument, the Prosecution cites the "Instructions on Approaching Third Parties Material to the Defence's Investigations" from the case of Katanga and Ngudjolo ("Instructions").⁵

The Prosecution's citation of the Instructions in isolation misstates and takes out of context the position taken in this case by Trial Chamber II. Subsequent to the issuance of the Instructions, the Trial Chamber issued a decision on 26 April 2010 revising the guidance it gave in the Instructions, which it stated were merely a "basis for discussion accompanied by provisional instructions which were given purely for guidance purposes and in light of the urgency of the situation."⁶ In this decision, the Trial Chamber also approved and made public the "Protocol on investigations in relation to witnesses benefitting from protective measures" ("Protocol").⁷ The Protocol did not govern the manner in which the Defence could contact potential witnesses;⁸ neither did it generally oblige the Defence to contact the VWU in advance of its investigations or prior to initiating inquiries or interviews.

⁵ Prosecutor v. Katanga et al, "Instructions on Approaching Third Parties Material to the Defence's Investigations", 18 December 2009, ICC-01/04-01/07-1734.

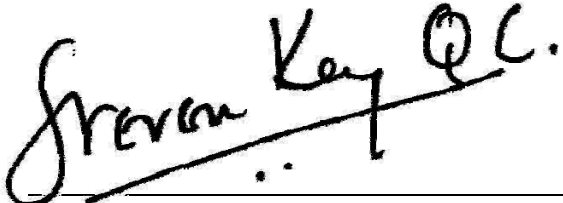

⁶ Prosecutor v. Katanga et al, "Decision on the 'Protocol on investigations in relation to witnesses benefitting from protective measures'", 26 April 2010, ICC-01/04-01/07-2047, see paragraph 9.

⁷ Prosecutor v. Katanga et al, "Decision on the 'Protocol on investigations in relation to witnesses benefitting from protective measures'", 26 April 2010, ICC-01/04-01/07-2047; ICC-01/04-01/07-2007-Anx1.

⁸ "This protocol concerns the use of the names of protected witnesses in the course of investigations or inquiries", "Protocol on investigations in relation to witnesses benefitting from protective measures", 27 April 2010, ICC-01/04-01/07-2007-Anx1, paragraph 1.

- (b) In previous cases, decisions of the Pre-Trial Chamber have 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.⁹
6. The issues set out in paragraph 5 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.

⁹ See Prosecutor v. Katanga and Ngudjolo, 'Décision relative aux modalités de contact entre des victimes représentées et les parties', 23 November 2010, ICC-01/04-01/07-2571, paragraph 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, paragraphs 26 and 27.

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



Karim A. A. Khan QC
On behalf of Francis Kirimi Muthaura

Evans Monari and Gershom Otachi
On behalf of Mohammed Hussein Ali

Dated this Monday 20 April 2011

The Hague, Netherlands