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

Date: 21 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

Prosecution's response to the Government of Kenya's request to reply

Source: Office of the Prosecutor

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

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1. On 4 April 2011 Pre-Trial Chamber II (“the Chamber”) rendered its “Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya” (“the Decision”) pursuant to Article 19 of the Rome Statute. The Decision invited the Prosecutor, the Defence, and the Office of Public Counsel for Victims (“OPCV”) to submit written observations by 28 April 2011¹.
2. On 11 April 2011, the Government of Kenya (“the Applicant”) filed an application seeking further direction from the Chamber pursuant to Rule 58 of Procedure and Evidence to “confirm its right to reply” to the observations submitted by the Prosecutor, the Defence and the OPCV. The Applicant proposed that it be given 30 days to file a reply, in other words by no later than 30 May 2011.²
3. The Prosecution notes that, under Regulation 24(5) of the Regulations of the Court, participants do not have a “right” to reply to responses, but can do so only with leave of the Chamber. The Prosecution concurs with the Applicant’s assertion that the parties and participants may raise matters “that it could not have addressed, or dealt with in full in its application”.³ If the reply is intended to update the Chamber on the status of the investigation since the time the original admissibility application was filed, it would appear to be within the language of Regulation 24(5). Moreover, the Prosecution notes that this is the first time this Court has considered a challenge brought by a State Party to admissibility, and it does not oppose allowing additional deference to a State in this circumstance.
4. However, the Prosecution requests that the Chamber require the Applicant to file its reply within 10 days of notification of the responses of the parties and

¹ ICC-01/09-02/11-40, p. 7.

² ICC-01/09-02/11-53, paras. 3 and 6.

³ ICC-01/09-02/11-53, para. 5.

participants, as stipulated in Regulation 34(c) of the Regulations of the Court. The Prosecution submits that, given the limited scope of the Applicant's proposal, any variation in the time frame should only be granted if the Chamber is satisfied good cause has been shown. Furthermore, this will ensure the expeditiousness of the Chamber's decision on the admissibility challenge.

5. Additionally, the Prosecution requests that the Chamber decline any other request to reply asserted by any other party or participant. To authorize further submissions would open the floodgate to a virtually endless stream of replies and counter-replies which could significantly delay the resolution of the admissibility challenge, with little to no added value.

Relief sought

6. For the aforementioned reasons, the Prosecution respectfully requests that:
 - (i) The Chamber grant Applicant's request for leave to reply to the responses of the Prosecution, Defence and OPCV concerning its admissibility challenge;
 - (ii) The Chamber require that the Applicant file any such replies within the 10 day time limit proscribed in Regulation 34(c).



Luis Moreno-Ocampo, Prosecutor

Dated this 21 April 2011

At The Hague, the Netherlands