



Original: **English**

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

Date: 28 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 Document

**Prosecution's Response to "Defence Request for Leave to Reply to the Prosecution's
Response to the Defence request for variation of Decision on Summons or in the
Alternative Request for Leave to Appeal"**

Source: The Office of the Prosecutor

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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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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Other

1. On 4 April 2011, the Single Judge of Pre-Trial Chamber II (“Single Judge”) issued the “Decision on Variation of Summons Conditions” (“Decision”).¹ Among other things, it requires that the Defence consult with the 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 consented to be contacted.
2. On 11 April 2011, the Defence of the three suspects in this case (“Defence”) filed the “Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal” (“Defence Request”).²
3. 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”.³
4. On 20 April 2011, the Defence sought leave to reply to the Prosecution’s Response, claiming that the Prosecution in paragraph 11 of its Response misstates the facts⁴ and its assertion is “incorrect and cannot be relied upon by the Pre Trial Chamber”. Its application for leave extensively attempts to argue the merits of its position.
5. The Prosecution objects to the Defence application. In the Prosecution’s view, the Defence has failed to demonstrate that “new legal and factual issues”⁵ exist justifying a reply. Not only does it seek to invoke a second opportunity to further argue issues that the Defence already fully canvassed in its initial Defence Request, it does so by making substantive arguments in the guise of

¹ ICC-01/09-02/11-38.

² ICC-01/09-02/11-52.

³ ICC-01/09-02/11-59.

⁴ The Prosecution made reference to the “Instructions on Approaching Third Parties Material to the Defence’s Investigations”, ICC-01/04-01/07-1734, 18 December 2009

⁵ ICC-01/09-02/11, para. 6.

demonstrating why its request is appropriate. That tactic is not permissible and should be rejected.

6. In sum, the Defence request for Leave should be denied.



Luis Moreno-Ocampo
Prosecutor

Dated this 28th day of April, 2011

At The Hague, The Netherlands.