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

Date: **19 July 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. WILLIAM SAMOEI RUTO, HENRY
KIPRONO KOSGEY AND JOSHUA ARAP SANG**

Public Document

**Prosecution's Request for Leave to Reply to the "Response of the Defence of Mr. Henry
Kosgey to the 'Prosecution's Submissions on the Order to the Prosecutor to File a
Proposed New Redacted Version of the Article 58 Application'"**

Source: 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**Luis Moreno-Ocampo, Prosecutor
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Mr. Allan Kosgey, Mr. Joel Kimutai Bosek
and Mr. Philemon K.B. Koech**Legal Representatives of the Victims****Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims**

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The Office of Public Counsel for the**Defence****States' Representatives****Amicus Curiae****REGISTRY**

Registrar

Ms Silvana Arbia

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Mr Didier Preira

Defence Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other**

1. The Prosecution respectfully seeks leave pursuant to Regulation 24(5) of the Regulations of the Court to file a brief reply to one precise issue raised in the “Response of the Defence of Mr. Henry Kosgey to the ‘Prosecution’s Submissions on the Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58 Application’” (“Kosgey Response”) filed on 12 July 2011.¹
2. The Prosecution’s request is triggered by paragraph 28 of the Kosgey Response, and the relief requested in paragraph 31 in respect thereof, namely:

28. In line with this jurisprudence [Decision concerning the Prosecution Proposed Summary Evidence, ICC-01/04-01/06-517], if the Pre-Trial Chamber concurs with the Prosecution that it is not possible to disclose the particular section of the Article 58 Application [G.2.II titled “Planning Meetings and Rallies”] without endangering Prosecution witnesses, the Defence requests the Pre-Trial Chamber to prohibit the Prosecution from tendering any evidence or raising any allegations at the confirmation hearing concerning preparatory meetings and rallies.

31. The Defence for Mr. Henry Kosgey respectfully requests the Honourable Single Judge to [...] prohibit the Prosecution from relying upon any allegations or evidence concerning these rallies and meetings at the confirmation hearing.

3. In effect, the Defence response is more than simply a reply to the Prosecution’s filing, it is an affirmative request for relief that exceeds the reach of the original filing. It is thus appropriate that the Prosecution be given leave to respond to this discrete Defence request.²
4. Moreover, Chambers of this Court have granted leave to reply on various grounds such as when submissions would be of assistance to the Chamber,³ or considering the importance and potential effect of the issues on the ongoing process of disclosure.⁴
5. The Prosecution considers its continued ability to redact specific information relating to planning meeting and rallies to be crucial in order to fulfill its duties under articles

¹ ICC-01/09-01/11-182.

² E.g., Trial Chamber II, Decision sur la demande d’autorisation de répliquer au document 2651 déposé par la Défense de Germain Katanga, 20 January 2011, ICC-01/04-01/07-2657; Corrigendum de la Décision relative à la demande du Procureur sollicitant l’autorisation de déposer une réplique à l’écriture ICC-01/04-01/07-2677-Conf, 3 February 2011, ICC-01/04-01/07-2680.

³ Trial Chamber IV, “Decision on the defence request for leave to reply”, 11 May 2011, ICC-02/05-03/09-147.

⁴ Pre-Trial Chamber I, “Decision on the Prosecution’s request for leave to reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”, 24 February 2011, ICC-01/04-01/10-61.

54(3)(f) and 68(1) to protect the safety of witnesses prior to the commencement of trial. However, it is also acutely aware that it must produce and be able to rely on sufficient evidence at the confirmation of charges hearing to meet its statutory burden under Article 61.

6. Noting the significance of this issue vis-à-vis witness protection and for the presentation of evidence at the confirmation hearing – particularly the potential ramifications that would flow from a reconsideration of authorised redactions and/or a ruling prohibiting the Prosecution from relying on this information – the Prosecution wishes to present its countervailing submissions for consideration by the Chamber.
7. If leave is granted, the Prosecution will file, within the 10 day time limit for filing a reply,⁵ submissions addressing only this one precise issue raised in the Kosgey Response.



Luis Moreno-Ocampo
Prosecutor

Dated this 19th day of July 2011

At The Hague, The Netherlands

⁵ Regulation 34(c).