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

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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 Defence Submissions on the Variation of Summons
Conditions for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed
Hussein Ali**

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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Introduction

1. The Prosecution requests the Pre-Trial Chamber to dismiss the application for variation of the conditions for the summons filed by the Defence of General Mohammed Hussein Ali, Francis Kirimi Muthaura, and Uhuru Muigai Kenyatta ("the Suspects")¹ on the basis that the suspects have no automatic standing "*to submit observations at the current stage of the proceedings as the proceedings triggered by the Prosecutor's application for a warrant of arrest or summons to appear are conducted on an ex parte basis*".²

2. Indeed the Pre-Trial Chamber has ruled in at least three previous decisions³ that "*none of the persons under the Court's investigation is allowed to participate even by way of submitting observations on the said applications. The Chamber, therefore, does not consider a person, against whom a summons to appear has been requested, as having locus standi[...]*"⁴

3. In addition, no identifiable prejudice arises from the lack of participation of the suspects at this stage. The Prosecution submits that the issue for which the suspects seek the intervention of the Chamber can easily be canvassed and addressed at the initial appearance of the suspects which is scheduled to take place in eight (8) days from the date of the filing of this response.

4. Finally, the Prosecution submits that once a person lacks procedural standing before the Court, the Court should refrain from delving into the merits of his/her

¹ ICC-01/09-02/11-13 ("the Suspects' Application").

² Pre-Trial Chamber II, "Decision on the 'Application for Leave to Participate under Articles 58, 42(5), (7)-(8)(a) of the Rome Statute and Rule 34(1)(d) and (2) of the Rules of Procedure and Evidence; ICC-01/09-47, para. 5

³ Pre-Trial Chamber II, Decision on Application for Leave to Submit Amicus Curiae Observations, ICC-01/09-35, para. 10; Pre-Trial Chamber II, "Decision on the 'Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)", ICC-01/09-42; id., "Decision on a Request for Leave to Appeal", ICC-01/09-43.

⁴ Pre-Trial Chamber II, Decision on a Request for Leave to Appeal, ICC-01/09-43, para. 4

application save for exceptional situations where it deems necessary to ensure, for instance, future clarity, judicial economy and expeditiousness of the proceedings.⁵ The Prosecution submits that the suspects, having failed to show such exceptional circumstances, must fail in their application.

5. However, should the Chamber be minded to examine the merits of the application of the suspects, the Prosecution submits that the conditions imposed do not impugn the rights of the applicants to conduct their investigations or to speak with witnesses in preparation of their defence. Article 67(1)(d), upon which the suspects base their request, enumerates the trial rights of accused persons and provides that the accused can conduct the defence in person “or through legal assistance of the accused”s choosing”. Even assuming *arguendo* that that provision applies to the pre-initial appearance phase, the suspects in this case have chosen several lawyers who are fully competent to investigate on their behalf and prepare the defence.
6. In short, properly qualified and responsible counsel can assist in the preparation of the defence including *inter alia* contacting witnesses without threatening interfering or tampering with the evidence. There is accordingly no need for the Chamber to vary the conditions it has imposed on the suspects.

Conclusion

7. For the reasons set out above, the Prosecution requests that the Pre Trial Chamber dismiss the Suspects’ application.

⁵ *ibid*, para. 7



Luis Moreno-Ocampo
Prosecutor

Dated this 28th day of March 2011

At The Hague, The Netherlands