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

Date: 11 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
PROSECUTOR *v.* FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA
AND MOHAMMED HUSSEIN ALI**

Public Document

**MOTION ON BEHALF OF THE GOVERNMENT OF KENYA FOR DIRECTION
TO CONFIRM THE RIGHT OF THE GOVERNMENT OF KENYA TO REPLY TO
OBSERVATIONS SUBMITTED BY THE PROSECUTOR, DEFENCE AND OPCV
PURSUANT TO THE DECISION ON THE CONDUCT OF THE PROCEEDINGS
FOLLOWING THE APPLICATION OF THE GOVERNMENT OF KENYA
PURSUANT TO ARTICLE 19 OF THE ROME STATUTE**

Source: The Government of the Republic of Kenya, represented by Sir
Geoffrey Nice QC and Rodney Dixon

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
Fatou Bensouda, Deputy Prosecutor

Counsel for Francis Kirimi Muthaura
Karim A. A. Khan QC and
Kennedy Ogeto

Counsel for Uhuru Muigai Kenyatta
Steven Kay QC and
Gillian Higgins

Counsel for Mohammed Hussein Ali
Evans Monari, John Philpot, and
Gershom Otachi Bw'omanwa

Legal Representatives of Victims

Legal Representatives of the Applicant
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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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Victims**
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A. Introduction

1. On 4 April 2011 Pre-Trial Chamber II rendered its Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya 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 2011.
2. The Decision was silent on the right of the Government of Kenya as the Applicant to reply to those observations once filed. The Pre-Trial Chamber did not mention the right of reply at the initial appearance hearing that was held on 8 April 2011 when discussing the timetable for the determination of the Application of the Government of Kenya pursuant to Article 19.
3. The Government of Kenya seeks a further direction from the Pre-Trial Chamber pursuant to Rule 58 confirming its right to reply to the observations submitted by the Prosecutor, the Defence and the OPCV. The Government proposes that it be given 30 days to reply by no later than 30 May 2011 at 16.00 hours.¹

B. Submissions

4. The Government of Kenya as the Applicant in the present Application filed by a State Party under Article 19 must be entitled to reply to the observations of the other parties that will be filed by 28 April 2011. As it is the Government that brings the Application challenging admissibility it should have the final word so that any matters raised by the parties that could not have been addressed in the Application can be answered by the Government before any decision is rendered by the Pre-Trial Chamber.
5. The right of reply derives from the concepts of procedural justice and due process in legal proceedings which concern the fairness of the processes by which decisions are

¹ The Government identified the need for a reply in its Application at para. 14. The proposed 30 day period is approximately the same period given to the Prosecution, Defence and OPCV to respond to the Application. It will ensure that all relevant information can be placed before the Chamber so as assist the Chamber in reaching its decision. It should also be taken into account that the Government will need to reply to the submissions of 8 parties in total and will require sufficient time to prepare its reply to ensure that all relevant matters are fairly and adequately covered.

made. In essence, the procedure to be followed must guarantee a fair outcome. In the present Application the opportunity to reply to the arguments and information submitted by the other parties is vital to ensure that the Government can respond to all matters raised that it could not have addressed, or dealt with in full in its Application. A fair outcome cannot be achieved:

- If the Government is denied the right to reply and put before the Chamber all relevant submissions and information in response to the submissions of the Prosecutor, the Defence and the victims. This is especially so in an Application of such great importance to a State Party of the ICC which is asserting its sovereign national jurisdiction over the cases presently before the ICC in accordance with the fundamental principle of complementarity.
 - Without all relevant arguments and information being before the Pre-Trial Chamber, included these which will rebut the submissions and evidence of any of the responses to the Application, for the Chamber to take into consideration in rendering its final decision.
6. Being mindful of the need to expedite the proceedings and to avoid any unnecessary delay, as emphasised by the Pre-Trial Chamber², the Government will be able to reply to all observations of the other parties within 30 days of the 28 April 2011 deadline. The desire for expeditious proceedings obviously cannot override the need to ensure that the proceedings are conducted fairly and with respect for the rights of all of the parties, including Kenya as a State Party to the Rome Statute. In addition, as noted by the Pre-Trial Chamber in an exchange between the Presiding Judge and the Prosecutor at the initial appearance hearing on 8 April 2011, the Article 19 proceedings do not cause any delay in the implementation of the Prosecutor's disclosure and other obligations in preparation for the confirmation of charges hearing.
7. The Government will, of course, not use its reply to repeat arguments already outlined in its Application. The purpose of the Reply will only be to address matters, including any information or evidence, raised by the parties that are not covered in the Application; to rebut submissions made by any of the parties and information or evidence filed by them that has not been answered in the Application; and, to provide

² Decision of 4 April 2011, para. 10.

and deal with any new relevant information. In this way, the Government would have had the opportunity fairly to put its whole case and respond to all arguments to the contrary, and the Pre-Trial Chamber will have the benefit of all relevant arguments and information to adjudicate fairly the matter at hand.

8. The wide and inclusive language of Rule 58 plainly incorporates all necessary rights and procedures that guarantee procedural justice. Rule 58 provides that the Chamber “shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings.” Such procedures and measures must include the right of reply to guarantee procedural fairness. As emphasised by the Pre-Trial Chamber, it “is bestowed with the necessary discretion to organise the proceedings related to an admissibility challenge in [a] manner that best suits the circumstances of each particular case.”³ The exercise of this discretion must be guided by the principles of procedural fairness to guarantee that a fair outcome can be achieved, which must include the right of reply.⁴
9. There have been no previous admissibility challenges brought by a State Party to the ICC under Article 19. In the proceedings concerning admissibility issues that have been initiated by the Defence, the Defence enjoyed a right of reply.⁵ The Government of Kenya as a State Party should not be placed in a worse position in the present Article 19 proceedings than any person who is accused before the ICC.

C. Conclusion

10. For these reasons, the Government of Kenya seeks confirmation of its right to reply in accordance with the principles of procedural fairness as enshrined in the Statute and Rules, particularly Rule 58. The Government proposes that pursuant to Rule 58 it be

³ Decision of 4 April 2011, para. 8.

⁴ Regulation 24 provides for the right of reply “with the leave of the Chamber, unless otherwise provided in these Regulations”. There is no provision in the Regulations for the procedure to be followed for the consideration of admissibility challenges under Article 19. Further, Regulation 1 provides that the Regulations “shall be read subject to the Statute and the Rules”. As noted above, Rule 58 gives the Chamber the necessary discretion to determine the “proper”, “appropriate” and “best” procedures for the determination of admissibility challenges. As set out in the present Motion, the Chamber should pursuant to Rule 58 thus direct that the Government as the Applicant can reply within the proposed 30 day period.

⁵ See *Prosecutor v Germain Katanga*, Decision on Application of the Defence for Germain Katanga to file a reply, ICC-01/04-01/07-1004, 27 March 2009; and before the Appeals Chamber, Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence, ICC-01/04-01/07-1295, 10 July 2009.

given 30 days to reply from the deadline when responses must be received, namely by 30 May 2011.

A handwritten signature in black ink, appearing to be 'RD' followed by a long horizontal stroke.

Sir Geoffrey Nice QC
Rodney Dixon
Counsel on behalf of the Government of the the Republic of Kenya

Dated 11 April 2011
London, United Kingdom