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

Date: 13 June 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 Document**

**Prosecution's Submissions Regarding Proposal to Conduct the confirmation  
Hearing in Kenya**

**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  
Fatou Bensouda, Deputy Prosecutor

**Counsel for Francis Kirimi Muthaura:**

Karim Khan and Kennedy Ogetto

**Counsel for Uhuru Muigai Kenyatta:**

Steven Kay QC and Gillian Higgins

**Counsel for Mohammed Hussein Ali:**

Gregory Kehoe, Evans Monari, Gershom Otachi and John Philpott

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

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**REGISTRY**

**Registrar**

Ms Silvana Arbia

**Deputy Registrar**

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. The Pre-Trial Chamber requested observations on the possibility of conducting the Confirmation Hearing in Kenya. The Prosecution considers that the security conditions make it impossible to conduct hearing in Kenya
2. In the Prosecution's view, the proceedings cannot be conducted away from the seat of the Court unless the Court is convinced that security in the new location is in accordance with Article 68(1) requirements. To the Prosecution's best information, no security assessment has been conducted that permits the Chamber to determine that conducting the proceedings on site will be in accordance with the Rome Statute's security requirements.
3. In accordance with the Prosecution's assessment holding the hearing in Kenya will further intimidate OTP witnesses, their families and potential witnesses, further restricting the Prosecution ability to present its case.
4. Prior to the Chamber's issuance of the Summonses to appear, the Prosecution received information that organized demonstrations, even riots, were being planned to protest the Chamber's decision. The criminal charges themselves involve allegations against members of the government – who remain influential in Kenya to this day. Their supporters organized mobilization of groups after the appearance of the suspects in Court. This could be repeated and create unnecessary risks if the Chamber decides to hold the proceedings in Kenya.
5. The Prosecution has a legal duty to protect its witnesses against all foreseeable risks. As it currently stands, the Prosecution considers that its witnesses cannot be adequately protected within Kenya. The Chamber has previously been informed of the existing concerns about witness security. In the Prosecution's View, the risks to witnesses/their families/perceived witnesses in Kenya are likely to be exacerbated if the proceedings take place in Kenya. This increased risk will effectively disable the Prosecution from presenting any, live witness evidence. If one or more persons testify, their appearance will present additional challenges,

including how to protect their anonymity and thus the anonymity of their families as well; the avoidance of attempts to bribe or intimidate them.

6. The Prosecution also has serious concerns for the safety of the Court's staff, including the staff of the Office of the Prosecution. During a UN visit to Kenya, Special Rapporteur Philip Alston reported that Kenyan intelligence officers attempted to obtain a list of individuals he was meeting; NGOs and other groups were harassed for information about schedule and details of the visit; persons were harassed by State officers after meeting with Alston, causing some to leave the country and others to hide; and human rights defenders were killed within two weeks of the visit. These events, individually and collectively, raise significant concerns about the safety of Court staff in a high visibility proceeding.
7. The Prosecution, the Chamber, and the Registry will also need to protect from improper disclosure its information, files and materials, and to be able to conduct its pre-hearing preparations un-surveilled and in a private and protected environment. It is likely that the staff of the Prosecution and the other organs will be subjected to high media scrutiny, eliminating all chances of anonymity. Nor is there any reason to believe that the State itself would not heavily scrutinize or monitor the preparations. The Prosecution, as well as the other organs, would not feel free to engage in internal discussions without fear of being overheard. In such a situation it would be difficult, if not impossible, to adequately prepare for the hearings.
8. The Prosecution reminds the Chamber that it is currently refusing to share its confidential information with the Government of Kenya because of concerns that the State will be unable to protect it, and it is also arguing to this Chamber that materials in the possession of the Court should also be withheld at this time.
9. The Court, moreover, will need to rely on security provided by the Kenyan Government which is litigating its opposition to the proceedings through an admissibility challenge that it is currently pursuing on appeal. Thus, though

Kenya is a State Party, its interests are divergent with the Court in this case since it also insists that the prosecution should not continue.

10. It is impossible to assume that the Government of Kenya will provide the essential cooperation and substantial protection to enable an effective continuation of the hearings in situ.

The Prosecution considers that the security conditions make it impossible to conduct hearing in Kenya.



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Luis Moreno-Ocampo, Prosecutor

Dated this 13<sup>th</sup> day of June 2011

At The Hague, The Netherlands