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

Date: 22 July 2011

THE APPEALS CHAMBER

Before: Judge Daniel David Ntanda Nsereko, Presiding Judge
 Judge Sang-Hyun Song
 Judge Akua Kuenyehia
 Judge Anita Ušacka
 Judge Erkki Kourula

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA,
 UHURU MUIGAI KENYATTA A ND MOHAMMED HUSSEIN ALI***

Public Document

**Prosecution's response to the Application on behalf of the Government of Kenya
 for Leave to Reply to the "Prosecution's response to the 'Appeal of the
 Government of Kenya against the Decision on the Application by the Government
 of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of
 the Statute'"**

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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Other

The Prosecution opposes the Appellant's request for leave to file a response. In the event that leave is granted and the Appellant makes new factual or legal arguments that were not contained in its original Document in support of its appeal, and thus for which the Prosecution had no opportunity to address, the Prosecution would request leave in turn to respond to that filing.

Procedural Background

1. On 20 June 2011, the Government of Kenya ("Appellant") filed its "Document in Support of the 'Appeal of the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute'".¹ The Appellant claims that Pre-Trial Chamber II's ruling that the case against the three Suspects is admissible under the Statute² is vitiated by factual, procedural and legal errors and seeks reversal of the decision before the Appeals Chamber.
2. On 12 July 2011, the Prosecution filed its response to the Appeal Brief, submitting that the Appellant had failed to establish any reversible error in the Pre-Trial Chamber's decision and that the appeal should therefore be rejected.³
3. On 20 July 2011, the Appellant filed its Application on behalf of the Government of Kenya for Leave to Reply to the "Prosecution's response to the 'Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'".⁴

Submissions

4. The Appeals Chamber has conclusively held that "[n]o applications for replies may be filed pursuant to Regulation 24 (5) of the Regulations of the Court to responses to documents in support of the appeal for appeals brought under rules

¹ ICC-01/09-02/11-130, ICC-01/09-02/11-130-Corr, ICC-01/09-02/11-130-Corr-Anx ("Appeal Brief").

² ICC-01/09-02/11-96 ("the Decision").

³ ICC-01/09-02/11-168 OA, para. 4.

⁴ ICC-01/09-02/11-180 OA

154 or 155".⁵ Accordingly, the Application cannot be granted by the Appeals Chamber.

5. The Prosecution acknowledges that the Appeals Chamber has also ruled that if arguments in a response to an appellant's brief on appeal make further submissions by the appellant "necessary for the proper disposal of the appeal", the Appeals Chamber has the discretion to direct the filing of such submissions pursuant to Regulation 28 (2) of the Regulations of the Court.⁶
6. The Prosecution considers that the instant Application merely involves disagreement by the Appellant with the arguments offered by the Prosecution in its Response, as well as the Appellant's intention to develop arguments that are already before the Appeals Chamber. Accordingly, there is no need for the Appeals Chamber to exercise its authority under Regulation 28 (2).
7. Should the Chamber consider that further submissions by the Appellant are necessary, the Prosecution requests that, bearing in mind the principle of equality of arms,⁷ the Prosecution be afforded an adequate opportunity to respond to those new submissions, if needed.

⁵ See *Prosecutor v. Lubanga*, [Decision Application for Leave to Reply](#), ICC-01/04/06-424 OA3, 12 September 2006, para. 6.

⁶ *Prosecutor v. Lubanga*, [Decision Application for Leave to Reply](#), ICC-01/04/06-424 OA3, 12 September 2006, para. 7. See also *Prosecutor v. Katanga*, [Judgment on Katanga's Appeal against the First Redaction Decision](#), ICC-01/04-01/07-476 OA2, 13 May 2008, paras.16-18.

⁷ The principle is one of the factors to consider when making Regulation 28 (2) determinations, as stated by the Appeals Chamber (see ICC-01/04/06-424 OA3, 12 September 2006, para. 7).

Conclusion

8. For the above referred reasons, the Prosecution requests that the Application be rejected. Should the Appeals Chamber decide to allow further submissions under Regulation 28 (2), the Prosecution requests that it be afforded an opportunity to respond to those submissions.



Luis Moreno-Ocampo,

Prosecutor

Dated this 22th day of July 2011

At The Hague, The Netherlands