Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **18 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 THE PROSECUTOR V. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG

Public Document

Response to Government of Kenya's Motion for Leave to Reply

Source: **Office of Public Counsel for Victims**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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INTRODUCTION

1. The victims oppose the Government of Kenya's request to file a reply in support of its application that the present case be declared inadmissible. The request is premature and, in any event, improperly seeks authorization to exceed the proper scope of a reply.

PROCEDURAL HISTORY

2. On 30 March 2011, Pre-Trial Chamber II ordered the Office of Public Counsel for Victims (the "Office") to represent unrepresented victim-applicants in this case until a legal representative is chosen by the victim or otherwise designated by the Chamber.[1] On 4 April 2011, the Pre-Trial Chamber also designated the Office to "represent all those victims who have submitted applications to participate in the proceedings" for the purposes of the inadmissibility proceedings.[2] On 5 April 2011, the Office received applications for participation in the present case, as transmitted by the Victims Participation and Reparations Section (the "VPRS"), in compliance with the Chamber's order. The present submissions are made on their behalf.

3. The Government of Kenya ("the Applicant"), on 31 March 2011, filed an application challenging the admissibility of the present case, as well as the *Muthaura et al.* case, pursuant to Article 19 of the Statute.[3] The Applicant – without waiting for any responses by the Prosecutor or victims – filed a request for leave to reply (the "Motion") on 11 April 2011.[4]

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[1] "First Decision on Victims' Participation in the Case", 30 March 2011, No. ICC-01/09-01/11-17 (*Ruto et al.*), par. 23.

[2] "Decision on the Conduct of Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute", No. ICC-01/09-01/11-31, 4 April 2011 (*Ruto et al.*), p. 7.

[3] "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute", No. ICC-01/09-01/11-19, 30 March 2011 (*Ruto et al.*); "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute", No. ICC-01/09-02/11-26, 30 March 2011 (*Muthaura et al.*)

[4] "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

SUBMISSIONS

(i) The Motion Is Premature In the Absence of Responses

4. No "right" to file a reply is recognized before the International Criminal Court, contrary to the Applicant's submissions.[5] Regulation 24 of the Regulations of the Court prescribes that replies may be filed only "with leave of the Chamber, unless otherwise provided in these Regulations." Other international tribunals also treat replies as a matter of discretion, rather than right.[6] The Applicant is therefore incorrect to suggest that a reply is an inherent aspect of procedural fairness.

5. Leave to reply has been granted as a matter of discretion in previous cases where the moving party has "shown good cause".[7] The need for such submissions depends on the nature of the responses received, to determine whether the Chamber would be assisted by supplemental submissions.[8] Allowing the moving party to reply does not always enhance the fairness of the proceedings; indeed, quite the opposite can be the case. A moving party may not, for example, deliberately refrain from making an argument on a foreseeable issue.[9] Recourse to a reply in respect of such arguments or information is not only a waste of judicial time, it "deprive[s] the

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Decision on the conduct of the proceedings following the application of the Government of Kenya pursuant to article 19 of the Rome Statute" No. ICC-01/09-01/11-48, dated 11 April 2011 and notified on 12 April 2011.

[5] Motion, paras. 3, 9, 10.

[6] ICTY Rules of Procedure and Evidence, Rule 126*bis*; STL Rules of Procedure and Evidence, Rule 8.

[7] "Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008", No. ICC-01/05-01/08-294, 27 November 2008, para. 3.

[8] "Decision on the Application of the Defence for Germain Katanga to File a Reply", No. ICC-01/04-01/07-2009, 27 March 2009, para. 3 ("given the importance of the issue raised by the Challenge to Admissibility *and in light of the Prosecutor's arguments set forth in his Response* … " (italics added); "Decision on the Prosecution's Request for Leave to Reply to the 'Defence Response to the Prosecution's Request for the Review of Potentially Privileged Material", ICC-01/04-01/10, 24 February 2011, p. 4 (referring to the "important and potential effect of the issues raised in the Prosecution request *and the Defence Response on the ongoing process of disclosure*" (italics added); "Decision on the Request for Leave to Reply", No. ICC-01/04-01/07-600, 17 June 2008, p. 4 (leave granted after the filing of the Prosecution response).

[9] "Decision on Defence Request for Leave to Submit a Reply" ICC-01/04-01/07-2792, 22 March 2011 (denying leave where the Chamber considered itself "sufficiently informed" of the issues based on the pleading and that no "new issue" had been raised in the responses).

[responding party] of its right to respond."[10] A motion should not be written in a deliberately vague manner so as to gain a tactical advantage, by depriving the respondents of a proper and full opportunity to respond. The appropriateness of granting leave to reply depends, therefore, on a substantive examination of the content of the response, and the specific purpose of the proposed reply.

6. The Applicant's request is unusual, if not unprecedented, in seeking leave to reply in advance of any responses having been filed. No good cause can be shown until those responses have been received, when the Applicant can describe with more particularity the purpose of a proposed reply. Only then can the Chamber properly assess whether a reply enhances or diminishes the fairness of proceedings.

7. Moreover, the Applicant's reliance on the *Katanga* decision is misplaced.[11] The Appeals Chamber, acting *proprio motu*, authorized both the Defence and Prosecution to file replies in respect of submissions by the State Party concerned.[12] The Appeals Chamber quite reasonably would have understood that the State probably possessed unique and confidential information about the scope of its own domestic investigations, to which the parties would need to reply. The situation here is very different: the State itself is the moving party, and possesses all the information required to present its position fully and candidly in its initial Article 19 application.

8. Therefore the Legal Representative submits that the Applicant's request is premature. The actual need to "address matters" or "rebut submissions" made by any of the parties,[13] depends on the content of their responses. In the absence of such submissions, the Applicant's need to reply is speculative, and good cause is not established.

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[10] *M. Nikolic v. The Prosecutor* (IT-02-60/1-A), Decision on Prosecution's Motion to Strike, 20 January 2005, para. 32.
[11] Motion, para. 9.
[12] "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", No. ICC-01/04-01/07 OA8, p. 4.
[13] Motion, para. 7.

(ii) The Applicant Is Requesting Leave to File Submissions That Exceed the Proper Scope of a Reply

9. The Legal Representative notes that the Applicant wishes "to provide and deal with any new relevant information" (underline added) in its proposed reply, so that it has "the opportunity fairly to put its whole case."[14] The formulation "to provide … any new relevant information" implies that the Applicant wishes to be granted wide latitude to proffer new factual information. Permission is, in effect, being requested to alter the factual basis of the Article 19 application through the reply.

10. This request exceeds the proper scope of a reply. The moving party is obliged to present its "whole case" in its original motion, so as to preserve the respondents' right to offer focused and relevant submissions on the merits of the request. A reply is a limited mechanism, "restricted to dealing with issues raised in the opposite party's response," and may not be used to "make new claims or raise totally new arguments."[15] In particular, the "limited scope of a reply" does not permit the moving party to "cure defects related to the vagueness" of the primary filing.[16]

11. The Applicant appears to be laying the groundwork for remedying the vagueness of the Article 19 application, which seems to have been carefully crafted to offer only the bare minimum of information about the state of ongoing investigations. The apparent intent to offer sweeping supplemental submissions, combined with the lack of transparency in the original motion, would significantly undermine the fairness and efficacy of the present proceedings.

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[14] *Id*.
[15] *Nikolic v. The Prosecutor* (IT-02-60/1-A), Decision on Prosecution's Motion to Strike, 20 January 2005, para. 32.
[16] *Id*. para. 37. *See Prosecutor v. Galic* (IT-98-29-A), Decision on the Prosecution's Motion to Strike New Argument Alleging Errors by Trial Chamber Raised For First Time in Appellant's Reply Brief", 28 January 2005.

12. The Legal Representative accordingly requests the Pre-Trial Chamber to reject the Motion.

Paolina Massidda
Principal Counsel

Dated this 18th day of April 2011

At The Hague, The Netherlands