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Date: 21 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

**FILING OF ANNEXES OF MATERIALS TO 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:

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**Unrepresented Applicants for
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Victims and Witnesses Unit

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**Victims Participation and Reparations
Section**

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Other

A. Annexes of materials to the Application

1. In the Government of Kenya's Application pursuant to Article 19 that was filed on 31 March 2011, the Government indicated that it would file copies of all legislation, reports and materials relied upon in its Application.¹
2. These documents are attached hereto in the Annexes listed in the Index as set out below. As explained in the Application, various investigative processes are continuing. There have been further developments in respect of these national investigations, including in respect of the investigations into the six suspects presently before the ICC. The latest materials from these investigations are attached hereto in the Annexes as listed in the Index.
3. These materials are evidence of the national investigations that are underway. They support the Government's Application as they demonstrate that the Government is investigating the two cases presently before the ICC, thereby rendering them inadmissible before the ICC pursuant to Article 19.
4. These materials also establish that the Government's Application will be further strengthened over the coming months as investigations continue and further reports can be submitted to the Pre-Trial Chamber on the progress made, as proposed in the Application. These additional materials are submitted with this filing so that the parties have the very latest documents in advance of filing their responses due by 28 April 2011, and so that the Government can reply to the responses of parties which will be based on all available and relevant information about the continuing national investigations.
5. It should also be taken into account that the Government of Kenya has filed a formal request for assistance with the ICC pursuant to Article 93(10), requesting the Prosecutor to share the results of his investigations in Post-Election Violence, including in respect of the six suspects, and to assist the Government in its continuing investigations.

¹ See para. 2, footnote 1.

B. Index

6. The following is a list of the materials in support of the Government's Application with the Annex number for each document, together with a brief explanation of the document, where necessary, and the relevant paragraphs of the Application for each document.

Part A: Investigations

Annex 1: Letter of instruction from the Attorney-General of Kenya to the Commissioner of Police to expedite all investigations into Post-Election Violence, including in relation to the six suspects before the ICC (14 April 2011).

7. The Attorney-General has instructed the Commissioner of Police to progress and conclude all investigations expeditiously in respect of all persons against whom there may be allegations of participation in Post-Election Violence, including the six suspects presently before the ICC. The Attorney-General has instructed that regular bi-monthly reports are submitted to him on these investigations including in respect of the six suspects. The instruction confirms that all cases, including the two cases before the ICC, are being investigated expeditiously and that progress reports will be available for submission to the Pre-Trial Chamber as indicated in the Application.
8. Relevant paragraphs in the Application: Paras. 3, 34, 66-79

Annex 2: Statement by the Attorney-General of Kenya on reform process and investigations into Post-Election Violence (9 April 2011).

9. The Attorney-General indicated that the instruction in Annex 1 would be given in his statement on 9 April 2011. He stated that: "I am directing the Commissioner of Police to ensure that all ongoing investigations and such other additional cases relating to Post-Election Violence in Kenya are concluded expeditiously".
10. Relevant paragraphs in the Application: Paras. 2, 3, 8, 17, 34, 67-79

Annex 3: Progress Report by the Team on Update of Post-Election Violence Related Cases (March 2011).

11. The Attorney-General refers to this report in the instruction of 14 April 2011, and it is thus included as an Annex for background purposes. The Report notes that there are over 3500 pending investigations and includes up-dated details on the gender based violence cases. The Report recommends that all investigations must be fast-tracked and continuously reviewed.

12. Relevant paragraphs in the Application: Paras. 3, 8, 33, 34, 66-79

Part B: Reports and Statements

Annex 4: ICC Press release, Statement of President of the Assembly of States Parties, Mr. Christian Wenaweser (28 January 2011).

13. Relevant paragraphs in the Application: Paras. 6, 33; FN 3, 4, 5, 31

Annex 5: Second Assembly of States Parties to the Rome Statute of the International Criminal Court, Report of the Prosecutor of the ICC (8 September 2003).

14. Relevant paragraphs in the Application: Paras. 24, 26, FN 12, 13, 14, 15

Annex 6: Report of the Bureau on stocktaking: Complementarity, Taking stock of the principle of the principle of complementarity: Bridging the impunity gap (18 March 2010).

15. Relevant paragraphs in the Application: Paras. 6, 27; FN 16

Annex 7: Assembly of States Parties: Resolution RC/Res.1 Adopted at the 9th plenary meeting (8 June 2010).

16. Relevant paragraphs in the Application: Paras. 27; FN 16

Annex 8: “Local Trials Possible, US Says,” Daily Nation (29 January 2011).

17. Relevant paragraphs in the Application: Paras. 44

Annex 9: “EU Says Reformed Kenyan Courts Could Try ICC Violence Suspects” Bloomberg Businessweek (22 March 2011).

18. Relevant paragraphs in the Application: Paras. 7; FN 6

Annex 10: Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII) (30-31 Jan 2011).

19. Relevant paragraphs in the Application: Paras. 44

Annex 11: Report on Support from the US Government for Reform and Restructuring of the Department of Public Prosecution in Kenya (2004 to date).

20. This Report confirms the support and assistance provided by the US Government since 2004 to the Department of Public Prosecutions of Kenya in reforming and modernising prosecution services in Kenya. It should be read in conjunction with Annexes 12, 13 and 14 on the restructuring and professionalising of prosecution services in Kenya, which together provide an overview of the various and extensive steps which have been and are being undertaken by the Department of Public Prosecutions to strengthen its capacity to conduct prosecutions of serious crimes. These reports all highlight the confidence of the international community in Kenya’s ability to deliver fair and effective investigations and prosecutions in Kenya in accordance with international standards. As noted in Annex 15, the recognition afforded by the international community to Kenya has resulted in Kenya being entrusted by the US, UK and EU to prosecute piracy cases within Kenya.

21. Relevant paragraphs in the Application: Paras. 2, 4, 8

Annex 12: UN Office on Drugs and Crime (UNODC) Report, “Towards Professionalised Prosecution Services in Kenya”.

22. In May 2010 UNODC as part of its assistance to the Directorate of Public Prosecutions of Kenya enlisted the services of a consultant to carry out a survey in all eight provinces of Kenya to identify weaknesses, challenges and modalities for professionalising and improving prosecution services in Kenya. Following the submission of UNODC's report (attached as Annex 12), a workshop was convened in March 2011 to review the report and decide on appropriate action. The statement of Mr. Keriako Tobiko, Chief Public Prosecutor of Kenya, to this workshop is attached as Annex 13. It provides an overview of the wide-ranging reforms that have been adopted to guarantee professional, effective and efficient prosecution services. The Report on the Workshop is also attached at Annex 14 as it highlights the priorities of the Directorate of Public Prosecutions in taking forward current investigations and prosecutions. It is the Directorate that is preparing reports on the investigations into Post-Election Violence and overseeing the investigations, as outlined above, into all allegations including those in respect of the six suspects presently before the the ICC.

23. Relevant paragraphs in the Application: Paras. 2, 4, 8, 36

Annex 13: Statement of Mr. Keriako Tobiko, Chief Public Prosecutor of Kenya, The Validation Workshop of the Report of the Baseline Survey on the Professionalisation of the Prosecution Services in Kenya (25-26 March 2011)

24. Relevant paragraphs in the Application: Paras. 2, 4, 8, 36, 71

Annex 14: Report on The Validation Workshop of the Report of the Baseline Survey on the Professionalisation of the Prosecution Services in Kenya (25-26 March 2011)

25. Relevant paragraphs in the Application: 8, 47, 48

Annex 15: Status Report on Piracy cases prosecuted in Kenya (2011).

26. The US, UK, EU, and other countries have signed memoranda of understanding with Kenya in respect of handing over suspected pirates captured by these countries off the coast of Somalia to Kenya for investigations and prosecution in Kenya. As the Report

records there are 15 cases that have been tried or which are being heard in Kenya of suspected pirates captured by the US, UK, German, Spanish, French, Swedish and Italian naval forces who have been handed over to the Kenyan courts for prosecution. The accused number in total over 130. Of the 15 cases, 6 have been concluded with 5 resulting in conviction and 1 in acquittal. The remaining 8 cases are at various stages of trial. It is the Directorate of Public Prosecutions in Kenya that is responsible for these prosecutions. As the Report demonstrates, Kenya clearly has the capacity and capability to investigate and prosecute these serious crimes, and the full backing of the international community in doing so on its behalf.

27. Relevant paragraphs in the Application: 8, 47, 48

Part C: Legislation

Annex 16: Constitution of Kenya, August 2010

28. Relevant paragraphs in the Application: Paras. 2, 5, 34, 40(ii), 41, 43, 48, 49, 50, 51, 53, 56, 57, 58, 60, 67, 68, 69, 75, 76; FN 1, 32, 37, 38

Annex 17: International Crimes Act 2008 (1 January 2009)

29. Relevant paragraphs in the Application: Paras. 23, 57, 58; FN 11; Para. 39

Annex 18: Judicial Services Act 2011 (22 March 2011)

30. Relevant paragraphs in the Application: Paras. 39, 52, 53, 60

Annex 19: Vetting of Judges and Magistrates Act 2011 (22 March 2011)

31. Relevant paragraphs in the Application: Paras. 53, 54, 55, 61

Annex 20: Witness Protection Amendment Act 2010

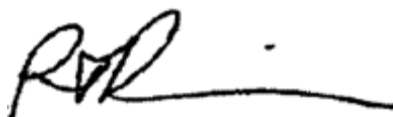
32. Relevant paragraphs in the Application: Paras. 78

Annex 21: *Witness Protection Act 2008* (1 September 2008)

33. Relevant paragraphs in the Application: Paras. 39, 78

Annex 22: *Commission for the Implementation of the Constitution Act 2010* (27 October 2010)

34. Relevant paragraphs in the Application: Paras. 77; FN 43



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Dated 21 April 2011
London, United Kingdom