



Original: **English**

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

Date: **3 August 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

**Prosecution's Request for leave to reply to the " Defence Response to
'Prosecution's Application for Leave to Appeal the Decision with Respect to the
Question of Invalidating the Appointment of Counsel to the Defence'"**

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

Counsel for the Defence

Mr Karim A.A. Khan
Kennedy Ogetto

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Pursuant to Regulation 24(5) of the Regulations of the Court, the Prosecution seeks leave to file a brief reply to the “Defence Response to the Prosecution’s Application for Leave to Appeal the Decision with respect to the Question of Invalidating the Appointment of Counsel to the Defence” (“Defence Response”).¹
2. On 21 July 2011, the Single Judge decided that Mr Essa Faal’s recent affiliation as Senior Trial Lawyer with the Office of the Prosecutor (OTP) was not an impediment to his appointment as defence counsel for Francis Kirimi Muthaura (“Decision”).² On 26 July, the Prosecution sought leave to appeal,³ and on 1 August the Defence filed the Defence Response.
3. Recognizing the extraordinary and exceptional nature of the relief it seeks, the Prosecution requests leave to file a brief reply because of the institutional importance of the issues raised in its initial application for disqualification.⁴ The reply would address and attempt to clarify its position on two points upon which, as is demonstrated by the Defence Response, there apparently is some confusion – the nature of the test that the Chamber applied in considering whether to invalidate Mr Faal’s appointment, and the relationship between that test and the test applied by another Chamber in a case for which leave to appeal has been granted.⁵



Luis Moreno-Ocampo, Prosecutor

Dated this 3rd day of August 2011

At The Hague, The Netherlands

¹ ICC-01/09-02/11-207.

² ICC-01/09-02/11-185.

³ ICC-01/09-02/11-195.

⁴ ICC-01/04-01/10-61.

⁵ ICC-02/05-03/09-179. The Prosecution filed its appeal brief on 25 July: see ICC-02/05-03/09-184OA, cited in Prosecution’s Application, para.31.