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

Date: 13 May 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul, Judge
Judge Cuno Tarfusser, Judge

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY
AND JOSHUA ARAP SANG

PUBLIC

**Observations on behalf of Henry Kiprono Kosgey to the 'Prosecution's Response
to 'Request for Assistance on behalf of the Government of Kenya pursuant to
Article 93(10) and Rule 194'**

Source: Defence

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 the Defence

Counsel for William Samoei Ruto:
Joseph Kipchumba Kigen-Katwa, David
Hooper QC, Kioko Kilukumi Musau,
Kithure Kindiki
Counsel for Henry Kiprono Kosgey:
George Odinga Oraro, Julius Kemboy
and Allan Kosgey
Counsel for Joshua Arap Sang:
Joseph Kipchumba Kigen-Katwa, Joel
Kimutai Bosek and Philemon K.B. Koech

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

Sir Geoffrey Nice QC
Rodney Dixon

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Pereira, Deputy
Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

INTRODUCTION

1. On 21st April 2011, the Government of Kenya filed its *“Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194 [the said ‘Request’]*.¹ The said Request was neither submitted on behalf of the Defence nor filed in the case of *Prosecutor V. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang [the ‘said Case’]*².
2. On 10th May 2011, the Prosecutor filed its *“Response to “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194” [the ‘Prosecutor’s Response’]*.³ The Prosecutor has not set out any reasons for the extra-ordinary decision to file its Response in the said Case.
3. The Prosecution has sought to challenge the said Request in three ways:
 - (i) That *‘a request for materials within the possession of the prosecution is not subject to judicial determination under Article 93(10) and Rule 194’*⁴ and as such it will in that regard directly respond to the Government of Kenya.
 - (ii) That the Government of Kenya *‘has not established that there is an investigation in Kenya’*⁵ against the suspects and as such the request under Article 93(10)(a) is not made out.
 - (iii) That it *‘considers that currently the suspects have the ability to influence the Government of Kenya policy and that any information provided to Kenyan authorities can be used to attack victims and witnesses’*⁶. As such, it alleges that a provision of the confidential information as sought by the

¹ ICC-01/09; 21 April 2011.

² ICC-01/09-01/11.

³ ICC-01/09-01/11; 10 May 2011.

⁴ The Prosecutor’s Response; ICC-01/09-01/11; Para. 2.

⁵ The Prosecutor’s Response; ICC-01/09-01/11; Para. 4.

⁶ The Prosecutor’s Response; ICC-01/09-01/11; Para. 5.

Government of Kenya will go against the Chamber's duty to protect victims and witnesses.

4. These observations therefore sets out the Defence position as to the effect of what amounts to the Prosecutor's attempt to further respond to the *Government of Kenya's admissibility challenge*⁷ filed on 31 March 2011 without leave of the Pre Trial Chamber but more significantly, the prejudicial nature of the contents of the said Response on the suspects.
5. For the reasons set out herein, it is submitted that the Prosecution's Response should be expunged from the record. In sum, the Defence position is as follows:
 - i. The Prosecution's Response is designed to place on the record new allegations concerning the prospects of an impartial investigation in Kenya in answer to the *Government of Kenya's admissibility challenge* without formal leave of the Pre-Trial Chamber;
 - ii. The Prosecution's Response is a cleverly contrived attempt to impermissibly introduce into the record unsubstantiated attacks on the conduct of the suspects as persons who cannot be entrusted with confidential information thereby laying a basis for future requests by the Prosecutor for protective measures which could jeopardize both the fairness and expeditiousness of the proceedings as well as the current timetable for the confirmation of charges hearing.

THE PROSECUTION'S RESPONSE

6. In essence, the Prosecutor's Response asserts that the Government of Kenya and the suspects are one and the same. As such, should the Pre-Trial Chamber accede to the said Request, confidential information about the victims and the

⁷ ICC-01/09-01/11 and ICC-01/09-02/11.

witnesses shall be at the disposal of the suspects thereby putting them at risk of attacks.

7. The Prosecution submits that 'Kenya poses significant security concerns' hence its belief that the '*government structure presently*' cannot '*provide the necessary protection of witnesses, potential witnesses, suspected witnesses, family members and victims*'⁸.
8. The Prosecution further submits that the suspects '*have influence sufficient to affect the Government of Kenya policy*' since '*some members of the Kenyan government has(sic) been campaigning to derail the Prosecutor's investigations*'⁹.

DEFENCE OBSERVATIONS

9. It will be noted that under Article 93, the modalities of assistance and co-operation are matters between the State, The Prosecutor and the Court. As such the Defence cannot make any significant submissions on the Request by the Government of Kenya.
10. The Defence is however concerned that the Prosecutor has under the guise of responding to the said Request by the Government of Kenya, mounted a scurrilous attack on the suspects without identifying their individual culpability. To attribute perceived weaknesses of the Government of Kenya on the suspects generally and to allege without showing good or proper cause that the said suspects are a danger to the victims and witnesses is inimical to the fair hearing of the proceedings for Confirmation of the Charges and the fundamental rights of the Suspects.
11. While the Prosecution has the latitude to participate in the determination of any request under Article 93 of the Statute, such an endeavour must be

⁸ The Prosecutor's Response; ICC-01/09-01/11; Para. 17.

⁹ The Prosecutor's Response; ICC-01/09-01/11; Para. 24.

undertaken in a manner that does not prejudice the fundamental rights of the Defence.

12. It is accordingly not expected that the Prosecutor would in the discharge of his statutory duties under Article 93 of the Statute feign a threat and impediment to its investigations by the suspects without first having taken out formal proceedings for protection of the witnesses and victims in the Chamber. This would be contrary to the spirit and express provisions of the Statute.

13. There is thus no foundation for the Prosecution's decision to file its Response in the present case; to the contrary, the Response is highly prejudicial to the rights of the Suspects having appeared in response to the summons and there being no allegation that they are in breach the conditions set by the Chamber.

CONCLUSION

14. For reasons set out above, the Defence of Mr. Henry Kiprono Kosgey respectfully requests that the Honorable Pre-Trial Chamber expunges the Prosecution's Response as filed in this case.



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

Dated this Friday, 13 May 2011

At Nairobi, Kenya