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PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

Public Document

**Application on behalf of the Government of Kenya for leave to reply to the
Prosecutor's Response of 10 May 2011 and Corrigendum of 11 May 2011 to
"Request for Assistance on behalf of the Government of Republic of Kenya
pursuant to Article 93(10) and Rule 194"**

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:

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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States Representatives

Sir Geoffrey Nice QC
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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. Request for leave to reply

1. The Government of Kenya pursuant to Regulation 24(5) respectfully requests leave to reply to the “Prosecution’s Response to ‘Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194 [of 21 April 2011]’” filed by the Prosecutor on 10 May 2011¹ with a corrigendum to this Response received on 12 May 2011.²
2. In his Response the Prosecutor has invited the Chamber to reject the Government’s Request for Assistance on various grounds based largely on very serious, as yet unsupported, allegations about the Government’s inability to protect victims and witnesses, which go so far as to claim (without any evidence) that the Government could be involved in witness intimidation. Allegations of such a serious nature, especially since they are unsubstantiated, clearly should not remain unanswered. They could not have been foreseen and thus could not have been anticipated in the Government’s Request of 21 April 2011.
3. Article 93(10) and Rule 194 include no express provisions on the procedure for replies in respect of requests for assistance by State Parties. The Chamber on 3 May 2011 ordered the Prosecutor to file a response to the Government’s Request pursuant to Regulation 24(1) “as there is a need to receive further information in order to take an informed decision on the subject matter”. The Government thus relies on the same Regulations (i.e. Regulations 24(5), 34(c), and 35(2)) to request leave to reply in order that the Chamber can receive the Government’s observations on the arguments and allegations relied on by the Prosecutor so that the Chamber can make an “informed decision” on the Government’s Request.
4. Although the Prosecutor’s allegations that are based on low, or the lowest, level sources will be said by the Government to be allegations that cannot be relied on at all, the Government cannot be certain that the Chamber will not feel obliged to take them into account in some way or will not be influenced by them in some way.³

¹ Prosecution’s Response to “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194”, 10 May 2011 (“Prosecutor’s Response of 10 May 2011”).

² Corrigendum to the Prosecution’s Response to “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194,” 11 May 2011.

³ Also see the challenges raised and information provided by the suspects in their recent filings: Observations on behalf of Henry Kiprono Kosgey to the “Prosecution’s Response to ‘Request for Assistance on behalf of the

5. Accordingly, these - and of course allegations more properly sourced - simply *have* to be responded to by the Government if the Chamber is to make a fair determination in respect of the Government's Request for Assistance, which goes to the root of the Government's Admissibility Application of 31 March 2011.
6. They are not allegations that can be responded to in a short time and doing the very best it can, the Government asks pursuant to Regulation 35(2), there being "good cause shown", for 28 days to prepare and submit its Reply. This time period would permit the Government to marshal all relevant materials for the Chamber and cover the real probability of Counsel having to go to Kenya to meet with senior police officers, witness protection officers and others in order to give maximum and the best quality of assistance to the Court in the Government's filing.⁴
7. The Chamber should have in mind the ease with which highly prejudicial and unsupported allegations of the kind advanced by the Prosecutor in his Response can be made and the difficulty of proving their falsity. The minor timetable consequences that proper allowance of time to the Government may involve are the inevitable result of the Prosecutor feeling it appropriate to make such wide ranging allegations of such a serious nature without a proper foundation to do so.
8. The Government, therefore, asks for this period of time to prepare and file its Reply so that (i) it can explain the measures that are in place or will be implemented to provide full protection to victims and witnesses, including through the Kenyan Witness Protection Agency, were the requested evidence provided to the Government by the Court and/or the Prosecutor, (ii) it can correct the misinformation provided by the Prosecutor in respect of matters referred to by the Prosecutor, and (iii) it can provide information on the investigations that are being undertaken by the Kenyan authorities into incidents cited by the Prosecutor as examples of alleged interference with witnesses.

Government of Kenya pursuant to Article 93(10) and Rule 194'", ICC-01/09-01/11, 13 May 2011; Defence Request to Strike the Prosecution's Response to "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194", ICC-01/09-01/11, 17 May 2011.

⁴ The issues listed at para 11 below show the scale of work that the Prosecutor's filing has made it essential for those representing the Government of Kenya to undertake personally or to supervise and scrutinise closely. It is manifestly not work that could be properly completed in a few days.

9. In addition, the allegations raised by the Prosecutor are plainly relevant to the Government's Admissibility Application as they directly challenge Government's ability to conduct genuine investigations and to protect witnesses both generally and in relation to the six suspects. Indeed, the Prosecutor even challenges the existence of a national investigation into the six suspects in his Response and relies on this assertion to argue that the Government's Request for Assistance should be rejected. The information the Government seeks to provide to the Chamber in its Reply will be directly applicable to the Admissibility Application and in the Government's submission is essential for the Chamber to review before any final determination of the Admissibility Application.

10. Moreover, as requested in the Government's Reply of 13 May 2011, the Chamber should not decide the Admissibility Application before it has determined the Government's Request for Assistance. The evidence requested in the Request could, if provided, have a significant impact on the national investigation that is presently underway into the six suspects. The principle of complementarity necessitates co-operation and assistance being provided by the Court to Kenya in its national investigation which in turn will enhance Kenya's application to exercise jurisdiction over the two cases presently before the ICC on the basis of its own investigations and proceedings. The Prosecutor should not be permitted to undermine the Government's national investigation by refusing assistance on spurious grounds and in order to support his opposition to the cases being found to be inadmissible. The decision on the Government's Request for Assistance ought therefore properly to be rendered in advance of the decision on the Government's Admissibility Application, and it ought to be regarded as a decision "in respect of" the admissibility of the two cases.⁵

⁵ The Government mentions this point and the wording of Article 82(1)(a) (Appeals against other decisions) as it may be that the Government or the Prosecutor would wish to appeal any decision of the Pre-trial Chamber on such a vital matter before any final decision is taken on the Admissibility Application, it being so integral to the determination of whether the cases are inadmissible under the principle of complementarity.

B. The Prosecutor's allegations to which a reply is required

11. The main assertions made by the Prosecutor, largely unsubstantiated by any concrete evidence, to which the Government seeks leave to reply are as outlined below. They will each need to be addressed in the Government's Reply with supporting evidence where appropriate. These issues are the following:

- The Prosecutor's submission that "a request for materials solely within the possession of the Prosecution is not subject to judicial determination under Article 93(1) and Rule 194"⁶ and the Prosecutor's view that he "may provide information from public sources to the Kenyan authorities, but at this point cannot provide any confidential information".⁷
- The Prosecutor's claim that the Government's request for materials within the possession of the Chamber should be denied because "Kenya has not established that there is an investigation ongoing in Kenya against the same individuals under investigation before the ICC".⁸
- The Prosecutor's allegation that "the suspects have the ability to influence the Government of Kenya policy and that any information provided to the Kenyan authorities can be used to attack victims and witnesses."⁹
- The Prosecutor's allegations that "the current situation in Kenya poses significant security concerns", that the Government of Kenya does not have "the governmental structure ... [to] provide the necessary protection of witnesses, potential witnesses, suspected witnesses, family members, and victims" (not sourced at all), and that witnesses and victims face "threats, intimidation, and other attempts to discourage their participation in the investigation" (similarly, not sourced at all).¹⁰

⁶ Prosecutor's Response of 10 May 2011, para. 2.

⁷ Prosecutor's Response of 10 May 2011, para. 13.

⁸ Prosecutor's Response of 10 May 2011, para. 3, 4.

⁹ Prosecutor's Response of 10 May 2011, para. 5.

¹⁰ Prosecutor's Response of 10 May 2011, para. 17.

- The Prosecutor’s allegation that “Witnesses currently face threats, intimidation, and other forms of tampering from a number of sources [not named]”.¹¹
- The Prosecutor’s allegations in respect of the trial of William Ruto in Kenya, including that “Recent media reports indicate that witness tampering may have played a role in the recent dismissal” as evidenced by the fact that “13 [witnesses] could not be found and five died while the case was going”, while those “who made it to the court became hostile to the prosecution.”¹²
- The Prosecutor’s allegations in respect of Bernard Kimeli, including that his killing was linked directly or indirectly to the Prosecution investigation and that he was “in possession of sensitive information in relation to the misuse of Police resources by the Government of Kenya and or the PNU during the post-election violence.”¹³
- The Prosecutor’s submission that the Government of Kenya has not explained how it “would ensure that any materials provided to the Applicant would be sequestered from members of the Kenyan Government who are currently the subject of proceedings before the Court or their allies.”¹⁴
- The Prosecutor’s suggestion that “persons other than the six suspects [who] do not have to obey orders of this Chamber to refrain from hate speech or public incitement” could be given access to the confidential information provided to the Government by the Chamber and Prosecutor and could incite violence and intimidate witnesses.¹⁵
- The Prosecutor’s claim that “the suspects have influence sufficient to affect the Government of Kenya policy” and that members of the Government have been “campaigning to derail the Prosecutor’s investigations”.¹⁶ The Prosecutor specifically alleges that “members of the Kenyan government [have] attempted

¹¹ Prosecutor’s Response of 10 May 2011, para. 19.

¹² Prosecutor’s Response of 10 May 2011, para. 18. See also, paras. 17, 19, 20.

¹³ Prosecutor’s Response of 10 May 2011, para. 21.

¹⁴ Prosecutor’s Response of 10 May 2011, para. 22.

¹⁵ Prosecutor’s Response of 10 May 2011, para. 23.

¹⁶ Prosecutor’s Response of 10 May 2011, para. 24.

to irregularly fast-track nominees for the posts of Chief Justice, Attorney General, Director of Public Prosecutions, and Controller”¹⁷ and to persuade other States not to support the ICC’s investigations.¹⁸

- The Prosecutor’s submission that he “plans to send a preliminary mission to Kenya to evaluate current security protections and risks, assuming Kenyan cooperation, as soon as it can be arranged with the Kenyan authorities.”¹⁹ The Government has stated in its Reply of 13 May 2011 in the Admissibility Application that it will of course cooperate with the Prosecutor to facilitate such a mission as soon as practicable. The Government requests that it be permitted to report to the Chamber in the Reply that it now seeks on the outcome of this mission as it could have a direct bearing on the Government’s Request. The Prosecutor has conceded that the results of this mission could affect matters and that he will “provide appropriate updates to the Chamber”.²⁰

C. Conclusion

12. For the reasons set out herein, the Government of Kenya respectfully requests the Chamber to grant the Government of Kenya leave to reply to the Prosecutor’s Response of 10 May 2011 within 28 days.

13. Further, the Government asks the Chamber to consider the Government’s Reply, once filed, before any final determination of the Admissibility Application is made and to render a decision on the Government’s Request for Assistance before a final determination is made of the Admissibility Application.

¹⁷ Prosecutor’s Response of 10 May 2011, para. 25.

¹⁸ Prosecutor’s Response of 10 May 2011, para. 27.

¹⁹ Prosecutor’s Response of 10 May 2011, para. 29.

²⁰ Prosecutor’s Response of 10 May 2011, para. 29.



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