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

Date: 19 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. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI***  
***KENYATTA AND MOHAMMED HUSSEIN ALI***

**PUBLIC**

**Defence Application for Leave to Respond to “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”**

**Source:** Defence of General Mohammed Hussein Ali

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

**The Office of the Prosecutor**

Mr. Luis Moreno-Ocampo, Prosecutor  
Ms. Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

**Counsel for Francis Kirimi Muthaura:**

Karim A.A. Khan QC and Kennedy Ogeto

**Counsel for Uhuru Muigai Kenyatta:**

Steven Kay QC and Gillian Higgins

**Counsel for Mohammed Hussein Ali:**

Evans Monari, Gershom Otachi  
Bw'Omanwa

**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**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia, Registrar

**Deputy Registrar**

Mr. Didier Daniel Preira, Deputy  
Registrar

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations**

**Other**

## Introduction

1. The Defence files this application pursuant to Regulation 24(5) and 31(c) of the Regulations of the Court seeking leave to file a response to “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””<sup>1</sup> for the reasons to be advanced hereunder.
2. The application is supported by two main grounds; firstly, that the Prosecution has filed its response in the record of the case and raised matters directly touching on the Defence without the Defence having a chance to comment on the same and, secondly, that the Prosecution’s response raises issues that are, in the opinion of the Defence, unsubstantiated and highly prejudicial to the Defence.

## Procedural history

3. On 21 April 2011 the Government of the Republic of Kenya (herein “GoK”) filed, in the Situation in the Republic of Kenya, its “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194”<sup>2</sup> (“the GoK request”)
4. This Chamber, through its Order pursuant to Rule 24(1), also filed in the record of the Situation in Kenya, directed the Prosecution to file a response to the GoK request by 10 May 2011.<sup>3</sup>
5. On 10 May 2011, the Prosecution filed “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””<sup>4</sup> and on 11 May 2011 filed “Corrigendum to the Prosecution’s Response to “Request for Assistance on behalf of the

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<sup>1</sup> ICC-01/09-02/11-86 and ICC-01/09-02/11-86-Corr (“Corrigendum”)

<sup>2</sup> ICC-01/09-58

<sup>3</sup> Pre-Trial Chamber II, *situation in the Republic of Kenya*, Order under Regulation 24(1) of the Regulations of the Court, ICC-01/09-60, 3 May 2011

<sup>4</sup> ICC-01/09-02/11-86

Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194.”<sup>5</sup> Both filings were filed in the record of the case of *Prosecutor v. Uhuru Muigai Kenyatta et al.*

## Submissions

6. Whereas the GoK request was filed in the *Situation* in the Republic of Kenya, the Prosecution has filed a response in the record of the *case* and made serious prejudicial allegations against the Defence.
7. The Defence notes Regulation 24 (4) and 24 (5) of the Regulations of the Court and submits that the filing of the response by the Prosecution in the record of the case despite the GoK request having been filed in the record of the Situation in the Republic of Kenya is a ground for the Defence to reply to the response either as a document anticipated under Regulation 24 (1) or in the alternative as argued herein request this Chamber to grant leave to reply to the response as provided by Regulation 24 (5).
8. The Prosecutor’s response presents novel issues as the Defence was not party to the request filed by the GoK in the record of the Situation. On that ground, the Defence asserts that, as of right, it is entitled to reply. However, as stated above, the Defence is cognizant that the regulations of the Court do not allow for a response to a document which is itself a response and hence this application is pursuant to Regulation 24(5).
9. Further, the Defence seeks leave to respond to the Prosecution’s response on grounds that the prejudicial matters raised therein potentially affect the Defence’s right to a fair trial. The Defence invokes the Chamber’s discretionary power to grant leave to reply in order to guarantee the Defence’s right to a fair trial. Without a chance to reply to the issues raised by the Prosecution that touch on the Defence then the Defence will be at a disadvantaged position vis-à-vis the Prosecution. The Defence reiterates the notion of fair trial as enunciated by Judge Georgios M. Pikis in “Decision on

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<sup>5</sup> ICC-01/09-02/11-86-Corr

the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'"<sup>6</sup>

The notion of a fair trial in all its manifestations is interwoven with that of equality of arms, warranting the assurance of equal opportunities to either side to present his/her case before the court.<sup>13</sup> The opportunity afforded to either side must, no doubt, be adequate for the presentation of his/her case. Equality before the law and the administration of justice permeates the entire judicial process. It is a pillar of justice; a fundamental principle of the law, as acknowledged by the International Court of Justice.<sup>7</sup> (Footnotes omitted)

10. If granted leave, the Defence will argue, at the outset, that the filing of the Prosecutor's Response in the record of the case of *Prosecutor v. Uhuru Muigai Kenyatta et al* instead of the Situation in the Republic of Kenya is of no legal basis and the same ought to be rejected *in limine*. The same amounts to an impermissible second response to the GoK's Application under Article 19 and thus should be rejected
11. Secondly, the Defence further wishes to address the Chamber on the prejudicial value of the far ranging unsubstantiated allegations against the suspects that have been made by the Prosecution in its response.
12. The Prosecution makes serious allegation on the purported role of the suspects in any alleged insecurity in the country. Without providing any grounds, the Prosecution asserts that the suspects have transformed a judicial process into a "national problem" and effectively imputes responsibility for purported insecurity in the country on unnamed suspects. In the relevant paragraph the Prosecution states:

"The Prosecutor submits that currently the suspects or their allies are able to influence the Kenyan government's position; they have transformed a judicial case against six individuals into a national problem. Under their influence the Kenya government now considers that an investigation of the post-electoral violence has the potential to reignite violence, break down law and order,

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<sup>6</sup> ICC-01/04-01/06-424

<sup>7</sup> *Id*, Para 6.

result in loss of human life in Kenya and disrupt economic peace and security activities in the region.”<sup>8</sup>

13. The Prosecutor further, without evidence, proceeds to make allegations that portray the Defence as involved in activities that endanger lives of “potential witnesses” and in particular invokes the unfortunate killing of a former police officer as an example.<sup>9</sup>
14. The Defence further considers that it is in the interests of justice to be allowed to respond to assertions by the Prosecution that the suspects have influence over the GoK. The Prosecution makes unsubstantiated claims that portray the Defence in a prejudicial manner and that amount to impermissible second response to the Article 19 challenge by the GoK. Without any basis to support its assertion, the Prosecution states, “In addition, it appears that the suspects have influence sufficient to affect the Government of Kenya policy.”<sup>10</sup>
15. The Prosecution’s serious prejudicial allegations have the potential of eroding the integrity of this Court unless the same are substantiated. The Prosecution’s innuendos are likely to hold sway among the affected communities and severely impede Defence investigations and deter potential witnesses from cooperating with the Defence. The Defence notes the affirmation of the Single Judge that the Chamber has a duty to uphold the integrity of the judicial proceedings<sup>11</sup> and has no doubt that it will perform that duty.
16. Moreover, the Defence submits that whereas the Prosecution and Defence are permitted to raise issues concerning the criminal activities of persons participating in the proceedings (such as witnesses), the Chamber has a duty to protect persons appearing before it. It is therefore imperative upon both the Prosecution and Defence to provide sound foundation for any allegations they

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<sup>8</sup> Para 8, Corrigendum.

<sup>9</sup> Para 21, Corrigendum.

<sup>10</sup> Para 24, Corrigendum.

<sup>11</sup> See Decision on the Defence "Application for Order to the Prosecutor Regarding Extrajudicial Comments to the Press" ICC-01/09-02/11-83 5 May 2011

make touching on persons taking part in the proceedings. The Defence submits that the Prosecution has made allegations whose foundation does not meet the 'reasonable grounds'<sup>12</sup> threshold. It is based on mere innuendo and unsubstantiated hearsay.

### **Relief sought**

17. For the foregoing reasons, the Defence requests for leave to respond to "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"

Respectfully submitted,




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Evans Monari and Gershom Otachi Bw'Omanwa  
On behalf of Mohammed Hussein Ali

Dated this 19<sup>th</sup> day of May, 2011,

At The Hague, Netherlands.

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<sup>12</sup> See Prosecutor v. Krajisnik Case No. IT-00-39-T, Decision on Cross-Examination of Milorad Davidovic, 15 December 2005, Para 9. In this case, the Chamber considered that where a party wished to confront a witness with what effectively constitute allegations that the witness has engaged in serious criminal conduct, that party must have reasonable grounds to do so at the time the allegations are made. The Chamber stated: "Reasonable grounds" does not require that the party have in its possession incontrovertible evidence of wrongdoing ; it does, however, require something more than mere hunch, innuendo, or unsubstantiated hearsay. Also, In the *Prosecutor v. Gotovina*, the Prosecution sought to cross-examine a defence witness concerning allegations of criminality which were based on a newspaper article. The Chamber upheld the defence objection that there was an insufficient foundation to raise such allegations (Prosecutor v. Gotovina et al Transcript of 30 September 2009, T. 22352 - T. 22355)