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No.: ICC-01/09

Date: 31 May 2011

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

Request on behalf of the Government of Kenya in respect of its Application 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
Defence**

States Representatives

Sir Geoffrey Nice QC
Rodney Dixon

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

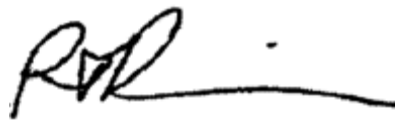
1. The Government of Kenya respectfully requests the Pre-Trial Chamber to rule on its Application of 18 May 2011 for Leave to Reply to the “Prosecution’s Response to ‘Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194’” (filed by the Prosecutor on 10 May 2011¹ with a corrigendum to this Response received on 12 May 2011²) before the Chamber renders its decision on the merits of the Government’s Request for Assistance.
2. The Government notes that in the Decisions issued yesterday refusing the Government’s Admissibility Application, the Chamber stated that it “shall rule on the merits of the Cooperation Request in a separate decision to be issued subsequently” (see para. 31).
3. The Government recognises that there is no express provision in the Statute, Rules and Regulations that requires the Chamber to render a separate decision on the Government’s Application for Leave to Reply, although clearly it can do so and Chambers have done so. Given the importance of the matter and in order to seek to safeguard its rights the Government files this request.
4. It should be taken into account that the Government filed its application for leave to reply on 18 May 2011 as it was firmly of the view that it should have a fair opportunity to respond to the very serious allegations made against the Government in respect of witness intimidation before any final decision was made by the Chamber on the merits of the Government’s Request.³ The Prosecutor’s allegations that the evidence in the two Kenya cases cannot be provided to the Kenyan authorities (even with appropriate protective measures in place) to assist in their national investigations because it will present a risk to the security of victims and witnesses, are plainly central to the Prosecutor’s refusal to co-operate with the Government, and could be relied on by the Chamber to refuse the Request. It is thus vital that the Government have a chance to reply to the Prosecutor’s allegations before any decision is rendered.

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 These allegations have been repeated in the press by the Prosecutor despite the matter being before the Pre-Trial Chamber for determination. The Prosecutor has, *inter alia*, claimed that high ranking members of Government are promoting a climate of fear that is intimidating witnesses (see Statement of the Prosecutor on the Situation in Kenya, 29 May 2011, which is posted on the ICC website).

5. These are matters of the greatest concern to the Government of Kenya not just because of the significance of cooperation in *domestic* investigations and proceedings *other* than those involving the six Suspects. Whether the Prosecutor should, and will, cooperate with the Government of Kenya is critical to the issue of the admissibility of the two cases presently before the ICC that will be further considered on appeal and/or at some later stage if and when there is any further application by any party to return jurisdiction to Kenya. Only by being allowed to reply to the Prosecutor's grave, but un-evidenced, allegations can the Government of Kenya ensure there is a record before the court of what its *present* response to those allegations may be, something of great potential importance for the deliberations of the Appeals Chamber and/or the Pre-Trial or Trial Chamber(s) at a later stage.



Sir Geoffrey Nice QC
Rodney Dixon
Counsel on behalf of the Government of the the Republic of Kenya

Dated 31st May 2011
London, United Kingdom