



Original: English

No.: ICC-01/09

Date: 25 July 2011

IN THE APPEALS CHAMBER

Before: Judge Daniel David Ntanda Nsereko, Presiding Judge
Judge Akua Kuenyehia
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF KENYA

Public Document

**Application on behalf of the Government of Kenya for Leave to Reply to the
“Prosecution’s Response to the ‘Appeal of the Government of Kenya against the
Decision on the Request for Assistance Submitted on Behalf of the Government
of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of
the Rules of Procedure and Evidence’”**

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 Defence

Legal Representatives of Victims

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massida

**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**

Fiona McKay

Other

A. Application for Leave to Reply

1. The Government of Kenya files this Application for Leave to Reply to the “Prosecution’s Response to the ‘Appeal for the Government of Kenya against the Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence’” filed on 20 July 2011 (the “Prosecutor’s Response of 20 July 2011”).
2. The Government of Kenya files this Application pursuant to Regulation 24(5) of the Regulations of the Court which provides that “Participants may only reply to a response with the leave of the Chamber.”
3. This is the first Request for Assistance from a State Party that has been submitted under Article 93(10) which is now before the Appeals Chamber. The appeal raises important issues of law and procedure for the ICC, namely whether such a request for assistance from the ICC by a State Party is sufficiently connected in the present case to the admissibility challenge to be joined on appeal, and whether the request itself should be granted so as not to undermine the Government of Kenya’s sovereign rights to try its own citizens. These are weighty and significant matters which are fundamental to the fair dispensation of justice in Kenya by the Kenyan authorities. They are important for the ICC’s future work in Kenya, as well as in other African countries, which is currently the main focus of the ICC’s jurisdiction.
4. Given the importance of the issues, the Government of Kenya submits that it should be entitled to reply to the Prosecutor’s Response of 20 July 2011 in which the Prosecution asserts (without any proper reasons) that the Government of Kenya’s appeal should be dismissed *in limine*. The Prosecution has mis-characterised the Government of Kenya’s appeal; it has failed to offer any compelling reason to refuse the appeal at this stage; and, it has made erroneous claims. The Government of Kenya should be permitted an opportunity to reply to these arguments (as summarised below) before any determination is made about whether the appeal should be dismissed *in limine*.

5. The Government of Kenya respectfully requests that it is permitted to file its Reply by such date as ordered by the Appeals Chamber.

B. Procedural History

6. It is evident from the procedural history that the Government of Kenya's Request for Assistance and its admissibility challenge are inseparable.
7. On 21 April 2011, the Government of Kenya filed the "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194" in which the Government of Kenya requested that "the Court and the Prosecutor provide to the appropriate Kenyan authorities the evidence in the possession of the Court and the Prosecutor to assist the Kenyan authorities in their national investigations and prosecutions."¹ The Government of Kenya stated in its Request for Assistance that the Request was directly related to its national investigation which included the six Suspects presently before the ICC and which is the subject of the Government of Kenya's admissibility challenge.² The Government of Kenya explained the connection between its admissibility challenge and the Request for Assistance in all of the pleadings that followed.³
8. On 10 May 2011, the Prosecution filed the "Prosecution's Response to 'Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article

¹ Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194, 21 April 2011 (hereinafter "Request for Assistance").

² Request for Assistance, paras. 5-7.

³ "Application on behalf of the Government of Kenya for leave to reply to responses, filed on 28 April 2011, to Application challenging admissibility in light of the responses as filed and of no decision being rendered in respect of the Government of Kenya's filing of 11 April 2011 requesting a direction on its right to reply", 2 May 2011, para. 16; "Reply on behalf of the Government of Kenya to the Responses of the Prosecutor, Defence, and OPCV to the Government's Application pursuant to Article 19 of the Rome Statute", 13 May 2011, paras. 3-7, 26, 50, 59; "Application for an Oral Hearing Pursuant to Rule 58(2)", 17 May 2011, paras. 25, 28; "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'", 31 May 2011, para. 5; "Appeal of the Government of Kenya against the 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", 6 June 2011, paras. 11, 26, 38; "Government of Kenya's Application for Leave to Appeal a Procedural Error in the 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute': 6 June 2011, paras. 2, 5-8; "Application on behalf of the Government of Kenya for Leave to Reply to the Responses by the Prosecutor and the OPCV to the Government of Kenya's Application for Leave to Appeal a Procedural Error in the Decision on Admissibility", 17 June 2011, paras. 8-12, 14; "Document in Support of the 'Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", 20 June 2011, paras. 12, 59, 70-78.

93(10) and Rule 194” with a corrigendum to this Response received on 12 May 2011. The Response invited the Chamber to reject the Government of Kenya’s Request for Assistance on various grounds including that there was no on-going national investigation. This is the same ground relied on by the Prosecution and the OPCV in opposing the Government of Kenya’s Admissibility Application.⁴

9. On 18 May 2011, the Government of Kenya submitted an application for leave to reply to the Prosecution’s Response of 10 May 2011.
10. On 31 May 2011, the Government of Kenya filed a request for the Pre-Trial Chamber to decide its request of 18 May 2011 for leave to reply to the Prosecutor’s Response of 10 May 2011 before it decided on the merits of the Government of Kenya’s Request for Assistance. The Government of Kenya stressed that it should have a fair opportunity to respond to all the allegations made against the Government of Kenya before any final decision was made by the Chamber on the merits of the Government’s Request for Assistance.
11. The Pre-Trial Chamber refused both of these requests and rejected the Request for Assistance in one decision on 29 June 2011.⁵ The Pre-Trial Chamber rejected the Government of Kenya’s Request for Assistance on the basis that the “two-page Cooperation Request ... lacked any documentary proof that there is or has been an investigation.”⁶ This was the same reason relied upon by the Pre-Trial Chamber to dismiss the Government of Kenya’s Admissibility Application in its earlier Decision of 30 May 2011.⁷
12. On 4 July 2011, the Government of Kenya filed the “Appeal of the Government of Kenya against the ‘Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence’” (the “Appeal of 4 July 2011”).

⁴ “Prosecution Response to “Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute”, 28 April 2011, paras. 12, 13, 24, 26-28; “Observations on behalf of victims on the Government of Kenya’s Application under Article 19 of the Rome Statute With Public Annexes 1 and 2”, 28 April 2011, paras. 1, 2, 10, 11, 18.

⁵ Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, 29 June 2011 (hereinafter “Request for Assistance Decision”).

⁶ Request for Assistance Decision, para. 34.

⁷ “Observations on behalf of victims on the Government of Kenya’s Application under Article 19 of the Rome Statute With Public Annexes 1 and 2”, 30 May 2011, paras. 65, 70.

The grounds relied on by the Government of Kenya are similar to those advanced in the Government of Kenya's appeal against the Admissibility Decision of 30 May 2011, in particular that there is clear and concrete evidence of the national investigation into the six Suspects.⁸

13. On 4 July 2011, the Government of Kenya also filed the "Government of Kenya's Application for Leave to Appeal the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence'" (the "Leave to Appeal of 4 July 2011"). In this filing the Government of Kenya stated that the "Government of Kenya's primary submission is that no leave is required to have its appeal heard by the Appeals Chamber", and that the Application for Leave to Appeal was submitted in the alternative.⁹

14. On 12 July 2011, the Appeals Chamber directed the Prosecution to file its response in relation to the provisions of Article 82(1)(a).

C. Reasons for granting leave to reply

15. There are three reasons for seeking leave to reply.

16. First, it must be clarified that the Government of Kenya does not assert that the Request for Assistance Decision is an "admissibility" decision (as the Prosecution incorrectly claims¹⁰). The Government of Kenya's submission is that it is "a decision *with respect to* ... admissibility" as provided for in Article 82(1)(a). The literal meaning of the term "*with respect to*" is defined as: "*in relation to, with regard to*".¹¹ The Government of Kenya seeks leave to file its Reply to explain that the Request for Assistance Decision is a decision "with respect to admissibility" by virtue of its

⁸ "Appeal of the Government of Kenya against the "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"" 6 June 2011, paras. 30, 34; "Document in Support of the "Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"", 20 June 2011, paras. 3, 5, 6, 7, 10, 11; "Appeal of the Government of Kenya against the "Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence"", 4 July 2011, paras. 2, 22-25.

⁹ Leave to Appeal of 4 July 2011, para. 4.

¹⁰ Prosecutor's Response of 20 July 2011, para. 17.

¹¹ Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/with%20respect%20to> . See also, Oxford Dictionaries, http://oxforddictionaries.com/definition/respect#m_en_gb0704190.015 where the phrase "with respect to" is also defined as: "as regards" and "with reference to."

clearly **relating to** admissibility. This is particular to the present case in light of the clear link between the Government of Kenya's admissibility challenge and its Request for Assistance, which was filed in order to complement its argument that the two Kenyan cases currently before the ICC are inadmissible.

17. The Prosecution wrongly asserts that a decision on a Article 93(10) Request for Assistance is not related to admissibility and thus an appeal on a decision relating to Article 93(10) is inadmissible as it is not "a decision with respect to jurisdiction or admissibility" pursuant to Article 82(1)(a).¹² The Prosecution is also wrong in claiming that because the Request for Assistance and the Request for Assistance Decision were filed in the Situation file while the Admissibility Application¹³ was filed in the two cases, that this fact "reflects that the request for cooperation is independent of the admissibility challenges".¹⁴
18. These are all matters which should be corrected by the Government of Kenya in its Reply. In the submission of the Government of Kenya, it is important for the Government of Kenya to show that there are compelling reasons for dealing with the appeals on admissibility and on the Request for Assistance together before the Appeals Chamber. The Government of Kenya needs to explain that the Prosecution has not put forward any good reason in law or as a matter of practice for separating the appeals, and it has not shown that any prejudice would be caused by joining the appeals before the Appeals Chamber.
19. Second, the Prosecution emphasises in its Response that the Government of Kenya has an automatic right of appeal to the Appeals Chamber on the issue of whether the Pre-Trial Chamber erred in refusing to decide the Request for Assistance before the Admissibility Decision.¹⁵ The Prosecution suggests that this right cannot extend to the merits of the Request for Assistance Decision itself.
20. The Government of Kenya seeks leave to reply to this misconceived argument. It should be explained in reply that there is no logical reason to barring the Appeals Chamber from hearing the appeal on the Request for Assistance Decision. If the

¹² Prosecutor's Response of 20 July 2011, para. 16, 18.

¹³ "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute", 31 March 2011 (hereinafter the "Admissibility Application").

¹⁴ Prosecutor's Response of 20 July 2011, para. 17.

¹⁵ Prosecutor's Response of 20 July 2011, para. 16.

Appeals Chamber can hear the appeal about whether the decision on the Request for Assistance should have been rendered at an earlier stage because it is sufficiently related to the admissibility challenge together with the decision on this challenge (as agreed by the Prosecution), there is no plausible reason why the appeal on the substance and merits of the decision on the Request for Assistance should not also be considered by the Appeals Chamber.

21. Third, the Government of Kenya seeks leave to reply in order to highlight the disclosure of confidential evidence that the Prosecution has been providing to the six Suspects but not to the Government of Kenya.¹⁶ Key aspects of this disclosure have been made since the Government of Kenya filed its appeal against the Request for Assistance Decision.¹⁷ This is the very evidence that the Government of Kenya requested it receive pursuant to its Request for Assistance.

22. With such evidence now being disclosed to the Suspects, the Government of Kenya seeks leave to explain in its Reply that there is no good reason for the Government of Kenya not to have access to the same evidence to review and work on in its national investigation into the six Suspects. It is ironic for the Prosecution to argue for confirmation of the charges against the six Suspects while seeking to keep them from trial in their own country by withholding the very evidence that might allow confirmation of charges whether in the ICC or Kenya. Resolution of

¹⁶ “Prosecution’s First Communication of Disclosure of Incriminating Evidence for Disclosure to the Defence”, ICC-01/09-01/11-80, 9 May 2011; “Prosecution’s Second Communication of Disclosure of Incriminating evidence to the Defence”, ICC-01/09-01/11-104, 3 June 2011; “Prosecution’s First Communication of Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence”, ICC-01/09-02/11-100, 3 June 2011; “Prosecution’s First Communication of the Disclosure of Potentially Exculpatory Evidence and Second Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence”, ICC-01/09-02/11-136-Red, 24 June 2011; “Prosecution’s First Communication of Potentially Exculpatory Evidence to the Defence”, ICC-01/09-01/11-149, 28 June 2011; “Prosecution’s Communication to the Defence of Incriminating Evidence pursuant to Article 61(3)(b) and material subject to disclosure pursuant to Rule 77”, ICC-01/09-01/11-166, 8 July 2011; “Prosecution’s Communication to the Defence of Incriminating Evidence pursuant to Article 61(3)(b)”, ICC-01/09-01/11-194, 14 July 2011; “Prosecution’s Communication to the Defence of Potentially Exculpatory Evidence and material for the preparation of the defence within the meaning of Rule 77”, ICC-01/09-01/11-207, 19 July 2011; “Prosecution’s Communication to the Defence of Potentially Exculpatory Evidence”, ICC-01/09-01/11-220, 25 July 2011; “Prosecution’s Communication to the Defence of Potentially Exculpatory Evidence”, ICC-01/09-01/11-219, 25 July 2011.

¹⁷ “Prosecution’s Communication to the Defence of Incriminating Evidence pursuant to Article 61(3)(b) and material subject to disclosure pursuant to Rule 77”, ICC-01/09-01/11-166, 8 July 2011; “Prosecution’s Communication to the Defence of Incriminating Evidence pursuant to Article 61(3)(b)”, ICC-01/09-01/11-194, 14 July 2011; “Prosecution’s Communication to the Defence of Potentially Exculpatory Evidence and material for the preparation of the defence within the meaning of Rule 77”, ICC-01/09-01/11-207, 19 July 2011; “Prosecution’s Communication to the Defence of Potentially Exculpatory Evidence”, ICC-01/09-01/11-220, 25 July 2011; “Prosecution’s Communication to the Defence of Potentially Exculpatory Evidence”, ICC-01/09-01/11-219, 25 July 2011.

complementarity/admissibility issues is not to be achieved as if “competing” jurisdictions do combat according to who holds the best evidence and who can keep such evidence from the other. In the absence of compelling reasons the Prosecutor should have made evidence in his possession available to the Government of Kenya, and his refusal to do so shows that the Prosecutor’s attempt to hold jurisdiction against the admissibility challenge is dependent not on his ability to show the Government of Kenya’s investigation of the six Suspects to be unsatisfactory but to hobble that investigation by non-cooperation with the Government of Kenya.

23. The Government of Kenya wishes to set out its arguments in its Reply in relation to the disclosure currently being made to the six Suspects. These will demonstrate that the appeal should not be dismissed *in limine* and that it should be considered by the Appeals Chamber with the appeal on admissibility.

D. Conclusion

24. For the reasons outlined above, the Government of Kenya respectfully requests that the Appeals Chamber grant leave to the Government of Kenya to reply to the arguments advanced by the Prosecution in its Response of 20 July 2011.



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

Dated 25th July 2011
London, United Kingdom