



Original: English

No.: ICC-01/09

Date: 18 October 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**

**Application on behalf of the Government of Kenya 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), Article 96 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

**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**

## A. Introduction

1. The Government of the Republic of Kenya files this application in order to request 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), Article 96 and Rule 194.’”<sup>1</sup>
2. The Government of Kenya files this Application pursuant to Regulation 24(5) of the Regulations of the Court which states that “Participants may only reply to a response with the leave of the Chamber.”<sup>2</sup>
3. The Government of Kenya submits that there are good reasons to grant leave to reply to the Prosecutor’s Response.
4. First, the Prosecutor has completely refused to provide any assistance at all to the Government of Kenya. He asserts that the Pre-Trial Chamber must simply deny the Government of Kenya’s Request for Assistance of 16 September 2011.<sup>3</sup> He offers no alternative solutions whatsoever. Kenya is the first State Party to request assistance and cooperation from the ICC pursuant to Article 93(10). There is no justification for the ICC Prosecutor to refuse to cooperate with the Government of Kenya on any level in the sharing of information about investigations undertaken. The Government of Kenya seeks leave to reply to this blanket refusal by the Prosecutor. It will address constructive ways in which the Prosecutor could cooperate with the Government of Kenya (see, for example, paras. 10-12, 16-18 below).
5. Second, the reasons relied on by the Prosecutor for his blanket refusal do require a reply from the Government of Kenya. Each reason is based on unfounded and erroneous allegations. The Government of Kenya should be provided with a fair opportunity to answer these allegations. In the Government of Kenya’s submission the Pre-Trial Chamber could be assisted in its determination of this very important matter by hearing the Government’s response to the Prosecutor’s allegations.

---

<sup>1</sup> Prosecution’s Response to ‘Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10), Article 96 and Rule 194, ICC-01/09-80, 6 October 2011 (hereinafter “Prosecution Response of 6 October 2011”).

<sup>2</sup> Regulation of the Court, Reg 24(5).

<sup>3</sup> “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10), Article 96 and Rule 194”, ICC-01/09-79, 16 September 2011 (hereinafter “Request of Assistance of 16 September 2011”).

6. There are three allegations which should not be left unanswered in order that the Pre-Trial Chamber can have before it all relevant submissions and information to render its decision:

- The Prosecutor claims that he cannot assist the Government of Kenya because of safety concerns for the witnesses. He asserts without any supporting evidence that “currently 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.”<sup>4</sup> The Prosecutor contends that unless the Chamber is confident that disclosure to the Kenyan authorities will not jeopardise witnesses, the Chamber must deny the request. It is only proper and fair that the Government of Kenya be given a chance to respond to the Prosecutor’s unsubstantiated and unfounded, and highly disrespectful, allegations against the Government of Kenya. The Government will demonstrate to the Chamber that disclosure to the Kenyan authorities will not jeopardise in any way the safety and security of any witnesses.
- The Prosecutor claims that the Government of Kenya has not established the existence of national investigations sufficient to justify the Request for Assistance. In support of this objection, the Prosecutor cites to findings of the Pre-Trial Chamber and Appeals Chamber in respect of the Government of Kenya’s admissibility application. The Government of Kenya should reply to this argument as it is misconceived. The Government of Kenya is not required to satisfy any test for admissibility as laid down by the Pre-Trial Chamber or the Appeals Chamber in order for its Request for Assistance to be granted. Article 93(10) does not require a State Party to establish that the cases being investigated nationally (in the present case, including in relation to the six Suspects currently before the ICC) would not be admissible before the ICC under Article 19. The Prosecutor has also overlooked the investigations into persons other than the six Suspects, which are relied on by the Government as a basis for its Request for Assistance. Seeking to deny the Request on the basis of admissibility and complementarity is completely to miss the point: even if a country is thought by the Court to be failing in its complementarity duties (which is certainly not the

---

<sup>4</sup> Prosecution Response of 6 October 2011, para. 3.

case in respect of Kenya<sup>5</sup>), it is precisely such a country which should be assisted by the Prosecutor in the form of the assistance sought here.<sup>6</sup>

- The Prosecutor appears to suggest that the Government of Kenya's Request for Assistance is not specific, relevant and necessary. This argument is simply wrong. The Government has identified the exact confidential filings that it requests should be provided to the Kenyan authorities so that this evidence can be considered in its national investigation. The Prosecutor is of course aware of the materials that the Government of Kenya requests. The Government of Kenya has fully complied with all of the requirements for requests for assistance.

The reasons why the Government of Kenya seeks leave to reply to each of these matters are set out below.

## **B. Leave to reply to unfounded and erroneous allegations**

### **(i) Safety concerns**

7. The Prosecutor refuses to assist the Government of Kenya because he claims that any information provided to the Kenyan authorities could be used to attack victims and witnesses.<sup>7</sup> He says he "does not believe that the governmental structure presently can provide the necessary protection of witnesses, potential witnesses, suspected witnesses, family members, and victims."<sup>8</sup>
8. It is quite improper for the Prosecutor to accuse the Government of Kenya of being involved in attacking victims and witnesses when he has produced no evidence in support of this very serious allegation. His response does not refer to any concrete evidence to substantiate his claims. The Government of Kenya objects to being

---

<sup>5</sup> It should be noted that even though the Appeals Chamber did not overturn the Pre-Trial Chamber's decision on the Government of Kenya's admissibility application, it did not find that the Government of Kenya had acted in bad faith in any respect. See Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', 30 August 2011, para. 84.

<sup>6</sup> In this regard see the Dissenting Opinion of Judge Anita Ušacka to the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled '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 September 2011.

<sup>7</sup> Prosecution Response of 6 October 2011, para. 3.

<sup>8</sup> Prosecution Response of 6 October 2011, para. 9, 10.

treated and smeared in this fashion when there is no evidentiary foundation established by the Prosecutor.

9. The allegations are so serious that the Government of Kenya, as any State Party would insist, must be given a fair opportunity to reply.
10. The Government of Kenya wishes to reply by setting out for the Pre-Trial Chamber the structures and programs it has in place for the protection of victims and witnesses. Contrary to the Prosecutor's sweeping belief that the Kenyan authorities are unable to guarantee the safety of victims and witnesses, the Government of Kenya can demonstrate to the Pre-Trial Chamber that it has the capability to protect witnesses and that it certainly will not be involved in attacking or threatening witnesses in any way. The Government of Kenya can identify in its Reply what steps it will take to ensure total confidentiality of any information received from the Prosecutor and that the security of all of the witnesses concerned, whether in an ICC witness protection program or not, will not be compromised.
11. The Government of Kenya can back this up with information about how it has dealt with recent events involving witness protection in Kenya. The Government very rapidly and effectively responded to recent alleged threats and attacks made against ICC witnesses. It will submit evidence to the Court showing that within hours of learning of one alleged attack, police were deployed to provide 24 hour security. As was widely reported, the Director of Public Prosecutions, Mr. Keriako Tobiko, ordered Police Commissioner Matthew Itere to conduct an "urgent and speedy" investigation into the matter.<sup>9</sup> CID officers have been investigating the attack by visiting the location and taking statements. The Government of Kenya can also provide evidence with its Reply to show that following another instance involving a threat to a witness, the police were deployed immediately and successfully provided security for the witness.<sup>10</sup> These are initiatives that the Prosecutor has completely ignored.

---

<sup>9</sup> Kenya: ICC Witness Family Flee to Eldoret, allAfrica, 27 September 2011, Tobiko Orders Investigations into ICC Witnesses Claims, The Nairobi Star, 27 September 2011, Tobiko orders probe into threats on witness family, The Standard, 28 September 2011, Kenya: High Security at Nandi Home of ICC Witness, allAfrica, 29 September 2011, Kenya: Ocampo Suspect Linked to Witness Home Attack, allAfrica, 4 October 2011.

<sup>10</sup> Kenya: Police Guard Home of Ali ICC Witness, allAfrica, 5 October 2011.

12. It is submitted that it is essential for the Pre-Trial Chamber to have this evidence in mind when considering whether it is satisfied that the safety and security of the witnesses concerned will not be jeopardised in any way if the evidence requested is provided to the Government of Kenya. This matter should only be decided on the basis of concrete evidence, and not the Prosecutor's vague, generalised and unsupported claim that the Government of Kenya is not to be trusted.

### **(ii) National investigations**

13. The Prosecutor argues that the Government of Kenya “does not establish the existence of national investigations sufficient to justify its request for assistance”<sup>11</sup>. He says that the Government “provide[s] only generalised assertions as to whether there is or has been an ongoing investigation.”<sup>12</sup> The Prosecutor relies on the findings of the Pre-Trial Chamber and Appeals Chamber in respect of the Government of Kenya's admissibility challenge under Article 19.

14. The Prosecutor uses the wrong test for determining whether requests for cooperation under Article 93(10) should be granted. Article 93(10) does not require a showing that the cases concerned are inadmissible under Article 19. It only requires that the Government of Kenya must establish that its investigations cover “conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State” as required by article 93(10).<sup>13</sup>

15. The Government of Kenya thus requests leave to reply to this erroneous assertion by the Prosecutor so that the Government of Kenya can set out the correct test to be applied.

16. In addition, the Government of Kenya needs to reply to the Prosecutor's unfounded argument that there is a “lack of information” about the conduct that the Government of Kenya is investigating. The investigation reports that were submitted with the Request for Assistance identify specific crimes in specific areas of Kenya that are being investigated. Annex 1, for example, lists each of the cases that are pending in the different provinces. It identifies the names of the alleged perpetrators and victims,

---

<sup>11</sup> Prosecution Response of 6 October 2011, para. 12.

<sup>12</sup> Prosecution Response of 6 October 2011, para. 17.

<sup>13</sup> ICC Statute, art. 93(10).

the places where the incidents occurred, and the circumstances of the alleged crime. Plainly, this information can be used by the Prosecutor to search his files for relevant materials. Moreover, in respect of the six Suspects the Government of Kenya has made it clear that it is investigating the same conduct for which the six Suspects are currently before the ICC, and has asked for evidence in respect of this alleged conduct. Regardless of whether the ICC is proceeding against the six Suspects, Kenya is under a free-standing duty to investigate all those suspected of involvement in the Post-Election Violence, including the six Suspects, and thus may request assistance to undertake these investigations.

17. As explained below, the Government of Kenya has identified very specific information from the Prosecutor's filings that it requests. It must be clear to the Prosecutor what materials are being sought by the Government of Kenya. Of course, if the Prosecutor was genuinely still requiring further clarification about what information was being requested, such matters could be addressed with the Government of Kenya through consultations. But it appears that the Prosecutor is instead seeking to find any argument to block any possibilities of cooperation, which is to be regretted.

18. It is for this reason that the Government of Kenya should be allowed to reply to the Prosecutor's complete refusal to cooperate. In its reply the Government can address the mechanisms that can be used to facilitate the exchange of information, even if, as a minimum, on a limited basis. It cannot be right that no information at all is capable of being shared with Kenya.

### **(iii) The requirements of Articles 93(10) and 96 and Rule 194**

19. The Prosecutor also attacks the Request for Assistance on the basis that he claims that the other requirements for such a Request have not been met. A reply to these arguments by the Government of Kenya should be permitted. They are without any merit and appear to be thrown in by the Prosecutor to seek to repel the Government of Kenya's Request at any cost.

20. First, the Prosecutor challenges the Government of Kenya's Request for lack of specificity. Yet, the Government of Kenya has listed the precise confidential



documents that it requests. There is no basis at all to argue that the Request is stated too broadly. This is a desperate attempt by the Prosecutor to block the Government's Request.

21. Second, the Prosecutor also appears to argue that the Government of Kenya has not shown that its Request is "relevant" and "necessary". The case law cited by the Prosecutor involves a request for assistance from a Defence team and not from a State Party to the ICC.<sup>14</sup> The circumstances in that case are in no way similar to those in the present case. This issue can be addressed in the Government's Reply. In any event, the Government can in its Reply show that it has met all of the requirements of the Statute and the Rules and that its Request should not be rejected on any purely technical grounds. The Government of Kenya has fully complied with the requirements of Article 96 and Rule 194. In particular, a "concise statement" of the purpose of the Request and of the essential facts underlying the Request has been provided. The Government of Kenya can show in its Reply that the Prosecutor's arguments are wrong.

22. Third, contrary to the Prosecutor's argument<sup>15</sup>, the Government of Kenya does not need to show that it cannot obtain the materials sought other than through the Prosecutor. Article 93(10) does not contain such a requirement. This matter needs to be addressed in the Government of Kenya's Reply. In any event, in respect of certain of the materials requested it appears that it is impossible for the Government of Kenya to access these materials in any other way. The Government of Kenya noted that in the recent confirmation hearings that the Prosecutor relied mainly on a handful of anonymous witnesses to support his allegations against the six Suspects, none of whom appear to reside in Kenya – there being no evidence, suggestion, or implication that this evidence has ever been available to the Government of Kenya. The Government of Kenya has specifically requested this evidence as it is currently prevented from accessing it. In this regard, the Prosecutor cannot complain that he does not know what evidence is being sought by the Government of Kenya.

---

<sup>14</sup> Prosecution Response of 6 October 2011, paras. 18, 19, citing Decision on "Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union", ICC-02/05-03/09-170, 1 July 2011, paras. 14-16.

<sup>15</sup> Prosecution Response of 6 October 2011, paras. 22, 23.

23. Fourth, the Prosecutor's argument that the Court is not obliged to assist the Government of Kenya in its national investigations requires a response.<sup>16</sup> It is so misguided and contrary to the spirit of the ICC's complementarity regime that it cannot go unanswered. The purpose of a State Party's Request for Assistance can of course be for national investigations that may render the case before the ICC inadmissible. Article 93(10) contains no limitation that information may only be requested providing it is not used in an admissibility challenge. To suggest otherwise would amount to arguing that the Prosecutor can refuse to provide information to a State Party in respect of a case solely on the basis that he claimed ownership of it and wished to prosecute it himself. The findings of the Pre-Trial Chamber (referred to by the Prosecutor<sup>17</sup>) that there is no linkage between the Request for Assistance and the issue of admissibility was solely concerned with whether the Request had to be decided *before* any decision was rendered on the admissibility challenge. The Pre-Trial Chamber never held that the Request for Assistance should be rejected because the information was being requested for national investigations that may result in the case being declared inadmissible. The Government of Kenya requests that it is permitted to set out its reply on this issue.

### C. Conclusion

24. For all of these reasons the Government of Kenya respectfully requests that it be granted leave to reply to the Prosecutor's Response.

25. Subject to Regulations 34(c) and 35 the Government of Kenya requests that it is granted until Monday 31 October 2011 to file its Reply given the nature of the legal and factual issues that should be addressed. In the submission of the Government of Kenya there are good grounds for permitting the Government of Kenya this period of time to file a Reply. The matters that need to be dealt with are substantial and very important. It is essential to demonstrate that the Prosecutor's blanket refusal is not justified in the circumstances and that appropriate mechanisms can be found to facilitate cooperation without jeopardising the safety of any witnesses or the interests of any of the parties. Furthermore, there is no reason requiring that any decision on the Request for Assistance be rendered before 31 October 2011.

<sup>16</sup> Prosecution Response of 6 October 2011, paras. 5, 6, 24.

<sup>17</sup> Prosecution Response of 6 October 2011, paras. 6, 24.

26. The Government of Kenya therefore respectfully asks the Pre-Trial Chamber to permit it to file a reply on the very important matters set out in this application.



---

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

Dated 18<sup>th</sup> October 2011  
London, United Kingdom