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No.: ICC-01/09
Date: 2 November 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

**Prosecution's Response to the Application on behalf of the Government of Kenya
for Leave to Reply**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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Unrepresented Victims

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Other

REGISTRY

Registrar

Ms. Silvana Arbia

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Defence Support Section

Victims and Witnesses Unit

Detention Section

Procedural Background

1. On 16 September 2011 the Government of the Republic of Kenya requested “all statements, documents and other evidence in the possession of the Court in the Situation in the Republic of Kenya and in the two Kenya cases currently before the ICC, namely cases ICC-01/09-01/11 and ICC-01/09-02/11.”¹
2. On 6 October 2011, the Prosecution opposed the Request for Assistance to the extent that it seeks confidential prosecutorial documents it submitted to the Court.²
3. On 18 October 2011, the Government of Kenya filed an application for leave to reply to the Prosecution’s Response.³

Submissions

4. The Government of Kenya seeks leave to reply in order to 1) “address constructive ways in which the Prosecutor could cooperate”, and 2) to answer the reasons relied upon by the Prosecution for its refusal.⁴
5. The Prosecution considers that the Application 1) intends to develop arguments that should properly have been addressed in its Request for Assistance, and 2) merely involves disagreement by the Government of Kenya with the arguments offered by the Prosecution in the Prosecution’s Response.
6. Moreover, the Prosecution notes that although the Government of Kenya supposedly seeks prior leave from the Chamber, its filing inappropriately advances arguments on the merits.⁵ Thus, even if the Application is denied, many of the arguments have already been put before the Chamber. This tactic contravenes Regulation 24(5) of the Regulations of the Court and has been

¹ “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10), Article 96 and Rule 194” (“the Request for Assistance”), ICC-01/09-79.

² “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” (“the Prosecution’s Response”), ICC-01/09-80.

³ “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’” (“the Application”), ICC-01/09-81.

⁴ ICC-01/09-81, paras. 4-5.

⁵ See paras. 7-23 of the Application whereby the Government of Kenya addresses at length the two points it purportedly seeks leave to reply to.

repeatedly censured by the Appeals Chamber, which has expressly refused to entertain substantive replies when the requisite prior leave of the Court was not sought or given.⁶

Conclusion

7. For the above mentioned reasons, the Prosecution requests that the Pre-trial Chamber deny the Application for leave to reply and disregard the submissions contained therein. Should the Chamber decide to allow the Application, the Prosecution submits that the Government of Kenya should be limited to relying on the submissions contained therein, and not be permitted to file any further submissions.



Luis Moreno-Ocampo, Prosecutor

Dated this 2nd day of November, 2011
At The Hague, the Netherlands

⁶ “The Appeals Chamber disapproves of a practice of the filing of a substantive reply prior to leave being granted by the Appeals Chamber, which in and of itself may also give rise to the rejection of an application for leave.” See ICC-01/04-01/06-824 OA7, para. 68. See also ICC-01/05-01/08-602 OA2, para. 9: “In accordance with rule 103 [...], the submission of substantive observations is only permissible after a Chamber has decided to invite or grant leave to do so. In the present circumstances, Aprocdec submitted substantive observations on the appeal in paragraphs 35 through 74 of the application without leave. For that reason, the Appeals Chamber shall disregard the substantive submissions contained in the Amicus Application.”