

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 10 May 2011

**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul  
Judge CunoTarfusser

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA, UHURU  
MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

**PUBLIC**

**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:** Office of the Prosecutor

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

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## **REGISTRY**

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**Registrar**

Silvana Arbia, Registrar

Didier Preira, Deputy-Registrar

**Victims and Witnesses Unit**

**Defence Support Section**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Introduction

1. The Government of the Republic of Kenya (“the Applicant”) filed its “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194” (“the Request), in which it requested the “transmission of all statements, documents or other types of evidence obtained by the Court and the Prosecutor in the course of the ICC investigations into the post-election violence in Kenya.”<sup>1</sup>
2. The Prosecution submits that a request for materials solely within the possession of the Prosecution is not subject to judicial determination under Article 93(10) and Rule 194. The Prosecution will respond directly to the Kenyan authorities with respect to those materials.
3. With respect to the request for materials within the possession of the Chamber, the Prosecution considers that the Court should not provide any confidential material at this time.
4. First, Kenya has not established that there is an investigation ongoing in Kenya against the same individuals under investigation before the ICC. If there is no investigation, the request for assistance does not satisfy the statutory language in Article 93(10)(a).
5. Second, the Chamber’s duty to protect victims and witnesses is a fatal obstacle to provide confidential information to the Government of Kenya.<sup>2</sup> The Prosecution considers that currently the suspects have the ability to influence the Government of

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<sup>1</sup> ICC-01/09-58. Dated 21 April 2011

<sup>2</sup> Article 68 of the Statute

Kenya policy and that any information provided to the Kenyan authorities can be used to attack victims and witnesses.

6. In this regard, the Prosecution brings to the Chamber's attention the circumstances surrounding the recent dismissal of criminal fraud charges against Ruto in Kenya. In particular, it is noteworthy that five witnesses slated to testify against him died before trial, 13 witnesses disappeared and could not be located, and remaining witnesses who survived and were available to testify recanted their previous incriminatory accounts and exculpated Ruto.
7. Additionally, Kenyan newspapers recently reported the killing of a senior government official in his home in Kenya, which is widely believed to be linked to his testimony before the WAKI Commission on the post-election violence and to fears that he might be cooperating with this Court.<sup>3</sup>
8. In the past the President and the Prime Minister of Kenya had expressed their respect for and cooperation with the International Criminal Court's intervention. 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, result in loss of human life in Kenya and disrupt economic peace and security activities in the region.
9. Absent confidence that disclosure to the national authorities will not jeopardize persons connected with the crimes under investigation, the Chamber must deny the request.

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<sup>3</sup> See, e.g., <http://www.the-star.co.ke/national/national/22726-why-top-cop-was-murdered> (last accessed 3 May 2011).

## Submissions

10. The Applicant seeks “materials to *advance its investigations* {...} including those in respect of the six suspects who are presently before the ICC”.<sup>4</sup> It further offers to “consult” with the Prosecution to resolve any problems arising from the request and acknowledges that where protective measures have been adopted, it will make arrangements for the protection of the interests of victims and witnesses in accordance with Kenya’s laws and witness protection programs.<sup>5</sup>
11. Article 93(10) gives the Court – which for these purposes includes all organs<sup>6</sup> -- the discretion to grant assistance to a State that is conducting an investigation or trial in respect of conduct that constitutes ‘a crime under the Rome Statute or which constitutes a serious crime under its national laws. Similarly, Rule 194 of the Rules of Procedure and Evidence addresses the process by which a State can seek assistance from the Court. Subsection (b) provides that requests are to be sent to the Registrar, “which shall transmit them, as appropriate, either to the Prosecutor or to the Chamber concerned”.
12. It is clear that the Rule contemplates that requests for materials within the possession of the Chamber are to be made to that Chamber, while requests for materials in the Prosecution’s possession will be made to the Prosecution. Article 93(10)(a) clarifies that the requested organ “may” cooperate and provide assistance.<sup>7</sup> In other words, both the Prosecution and the Chamber have the discretion to refuse to comply with a

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<sup>4</sup> ICC-01/09-58. Para 5 of the Request

<sup>5</sup> ICC-01/09-58. Para 10 of the Request

<sup>6</sup> F. Goia, “Reverse Cooperation” and the Architecture of the Rome Statute: A Vital Part of the Relationship between States and the ICC?; M.C. Malaguti (ed), ICC and INTERNATIONAL COOPERATION IN THE LIGHT OF THE ROME STATUTE, p. 88 et seq. (2007).

<sup>7</sup> Rule 194 of the Rules of Procedure and Evidence.

request even if the predicates – an investigation or ongoing trial in respect of conduct subject to the Court’s jurisdiction – are established.

13. Since 2003, the Prosecution has defined a policy of “positive complementarity” based on the duty to cooperate established by article 93(10) and the principle of complementarity. This interpretation of the Statute supports a proactive cooperation with States that are conducting genuine investigations and prosecutions. In accordance with its positive complementarity policy, the Office will assist a State in any genuine investigation subject to the fulfilment of its security duties. In the current case the Prosecution informs the Chamber that it may provide information from public sources to the Kenyan authorities, but at this point cannot provide any confidential information.
14. With respect to non-public materials that the Prosecution has submitted to the Court in the course of the proceedings, and that are thus in the possession of the Chamber, the Prosecution urges the Chamber to reject the Applicant’s request.
15. First, as a matter of law, Kenya has not sufficiently established the predicate for assistance and cooperation provided in Article 93. There is no active ongoing investigation of the same persons for the same conduct that constitutes a crime within the jurisdiction of the Court.<sup>8</sup>
16. Second, and also as a matter of law, the Chamber should not provide assistance unless it concludes that providing the requested information will not jeopardize the safety and well-being of persons or the cases before this Court in accordance with

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<sup>8</sup> The Prosecution had requested assistance from the Kenyan authorities, but Kenya recently declined to provide the assistance sought at this time, on the ground that its own admissibility challenge was pending.

article 68. The Prosecution submits that the record does not permit the Chamber to reach that conclusion.

17. As the Prosecution has noted in other filings,<sup>9</sup> the current situation in Kenya poses significant security concerns. The Prosecution does not believe that the governmental structure presently can provide the necessary protection of witnesses, potential witnesses, suspected witnesses, family members, and victims. To the contrary, the Prosecution has received reports that these persons living in Kenya face threats, intimidation, and other attempts to discourage their participation in the investigation. This includes publication of information about alleged witnesses on the internet, and veiled public threats and incitement by associates of the suspects.
18. The Prosecution also brings to the Chamber's attention the circumstances surrounding the recent dismissal of criminal fraud charges against Ruto in Kenya. Recent media reports indicate that witness tampering may have played a role in the recent dismissal of fraud charges that Ruto faced in Kenya. It was reported on 13 April 2011 that, "[o]f the witnesses that the prosecution had lined up, 13 could not be found and five died while the case was going on", while those "who made it to the court became hostile to the prosecution".<sup>10</sup> On 16 April 2011, it was reported that the acquittal of RUTO was based on the Prosecution's failure to produce evidence linking him to the crimes charged.

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<sup>9</sup> ICC-01/09-01/11-2, para. 4.

<sup>10</sup> Walter Menya, "Police, AG trade blame over acquittal of Ruto," Daily Nation, 13 April 2011, available at <http://www.nation.co.ke/News/-/1056/1144280/-/10yegutz/-/index.html> (last accessed 14 April 2011), ("The police said 13 key witnesses could not be traced. Five other key witnesses had died, which brings to 18 the number of witnesses who were not produced in court. The prosecuting counsel could not do anything," [Chief Public Prosecutor Keriako] Tobiko said [...] 'a number of witnesses disowned the statements and turned hostile to the prosecution'; Tobiko blamed these problems on police failure to properly conduct the investigation).

19. Witnesses currently face threats, intimidation, and other forms of tampering from a number of sources. Some purport to reveal sensitive information about persons who are supposedly Prosecution witnesses, such as their names and personal contact information, and blame these persons for the prosecution of the suspects.<sup>11</sup> Regardless of whether these sources correctly identify witnesses, they place the identified persons and their families in danger because they may be believed or perceived to be cooperating with the Prosecution.
20. The Prosecution submits that within the particular context of Kenya, these comments are intended to and in fact do put significant pressure on Prosecution witnesses to recant or face effective banishment from their communities. They also chill the willingness of future witnesses' willingness or desire to cooperate with the Court.
21. Additionally, a recent incident is particularly illustrative of this degrading security environment likely to be linked, directly or indirectly, to OTP investigation. On 28 April 2011, Bernard Kimeli, the former senior Deputy Commissioner of Police of the Kenya Police Training College, was killed in his house in a rich and well-protected suburb of Nairobi. Circumstances indicate that his murder was well prepared. Media reports and comments on Kenyan websites and blogs allege that his murder was probably linked to OTP investigations because his attackers only took documents from his house. It is alleged that due to his position, Kimeli was in possession of sensitive information in relation to the misuse of Police resources by the Government of Kenya and or the PNU during the post-election violence. It should be noted that, despite the fact that Kimeli did not give any testimony to a Kenyan investigation, he was mentioned by another witness as one of the three

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<sup>11</sup> Annex 2, KEN-OTP-0047-0052 at 0053, 0054; Annex 3, KEN-OTP-0047-0058, *passim*. Please note: the published statements are not from interviews that the Prosecution conducted, but rather are written statements that third parties forwarded to the Prosecution; Annex 4, KEN-OTP-0048-0096 at 0097; Annex 5, KEN-OTP-0048-0104, *passim*; Annex 6 KEN-OTP-0050-0085, *passim*.



senior police officers forced to retire during the violence, allegedly due to his opposition to the PNU's misuse of the police force at that time.

22. The Prosecution further notes that the Applicant's request does not explain how the Applicant would ensure that any materials provided to the Applicant would be sequestered from members of the Kenyan Government who are currently the subject of proceedings before the Court or their allies.
23. For instance, Laikipia East Member of Parliament Mwangi Kiunjuri said that persons other than the six suspects do not have to obey orders of this Chamber to refrain from hate speech or public incitement, and "are free to talk as we wish".<sup>12</sup> At a rally held earlier in April 2011, Kiunjuri and others, in the company of Ruto and Uhuru Kenyatta, made statements which were considered so troublesome that the Ministry for Internal Security and the National Cohesion and Integration Commission warned politicians against engaging in hate speech and incitement, indicating that they were using the same type of language which helped to ignite the 2007 post-election violence.<sup>13</sup>
24. In addition, it appears that the suspects have influence sufficient to affect the Government of Kenya policy. Since the presentation of their case before the Chamber some members of the Kenyan government has been campaigning to derail the Prosecutor's investigations.

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<sup>12</sup> Kipchumba Some, "Ocampo Six allies threaten to defy hate speech warning", Daily Nation, 9 April 2011, available at <http://www.nation.co.ke/News/politics/Ocampo+Six+allies+threaten+to+defy+hate+speech+warning+/-/1064/1141860/-/15um1nlz/-/index.html> (last accessed 18 April 2011)

<sup>13</sup> John Ngirachu, "Uhuru and Ruto warned over hate speech at rallies", Daily Nation, 2 April 2011, available at <http://www.nation.co.ke/News/politics/-/1064/1137688/-/7qad2x/-/index.html> (last accessed 18 April 2011), attached hereto as Annex 12.

25. Members of the Kenyan government attempted to irregularly fast-track nominees for the posts of Chief Justice, Attorney General, Director of Public Prosecutions, and Controller, critical positions if the Kenyan judicial system will investigate the crimes. On 29 January 2011, Prime Minister Odinga publicly declared that the nominations failed to comply with Kenya's constitution.<sup>14</sup> The Judicial Service Commission and the Commission on the Implementation of the Constitution (CIC) similarly indicated that the appointments were irregular.<sup>15</sup> The High Court then ruled, on 3 February 2011, that these nominations contravened Kenya's constitution.<sup>16</sup> On 22 February 2011, President Kibaki withdrew the nominations

26. Deputy President Kalonzo Musyoka and other Kenyan Government representatives have also sought to persuade other African states that the OTP's investigations of the six suspects is against the Kenyan Government and warrants regional opposition to the Court. They visited several African capitals to garner support for a request to defer this investigation in advance of the African Union Summit in late January 2011. Mr. Musyoka was quoted in the Kenyan media as having stated, regarding the AU's assistance, "We expect a no or yes vote so we can know whether the court (ICC) is meant for foreigners or Africans."<sup>17</sup>

27. The same Deputy President and other members of the government, acting as special envoys, have embarked on a "shuttle diplomacy" campaign to try to persuade Security Council member states to defer the Court's proceedings against the six

<sup>14</sup> Capital FM, Raila rejects judicial nominees, 29 January 2011 (<http://www.capitalfm.co.ke/news/Kenyanews/Raila-rejects-judicial-nominees-11455.html>).

<sup>15</sup> See, for example, Capital FM, Judiciary breaks ranks with Kibaki on nominees, 31 January 2011 (<http://www.capitalfm.co.ke/news/Kenyanews/Judiciary-breaks-ranks-with-Kibaki-on-nominees-11479.html>); Daily Nation, CIC declares Kibaki's judicial nominees unconstitutional, 31 January 2011 (<http://www.nation.co.ke/News/politics/-/1064/1099154/-/7ax5cd/-/>).

<sup>16</sup> Text of ruling: Kenya Law ([http://kenyalaw.org/Downloads\\_FreeCases/162011.pdf](http://kenyalaw.org/Downloads_FreeCases/162011.pdf)).

<sup>17</sup> "Unity key to victory, Uhuru tells allies," Daily Nation, 8 May 2011, <http://www.nation.co.ke/News/politics/Unity+key+to+victory+Uhuru+tells+allies+/-/1064/1158720/-/xnw63i/-/>

suspects..<sup>18</sup> Notably, in a 4 March 2011 letter from the Kenyan Ambassador to the UN Security Council,<sup>19</sup> the Kenyan Government sought to justify a deferral of the Kenya cases by stating that the current ICC process has the potential to reignite violence, breakdown law and order, result in loss of human life in Kenya and disrupt economic, peace and security activities in the sub-region. The letter argued that if the ICC process is not well managed it could “interfere with the sovereignty of member states.’

28. The Prosecutor considers it significant that other members of the Government had indicated that they do not consider these actions are in good faith.<sup>20</sup>

29. The Prosecution plans to send a preliminary mission to Kenya to evaluate current security protections and risks, assuming Kenyan cooperation, as soon as it can be arranged with the Kenyan authorities. Depending on the results of that mission, a more thorough analysis may be performed. The Prosecution will provide appropriate updates to the Chamber. In light of the current situation, however, it would pose an unacceptable risk to persons and the investigation to disclose non-public information at this time.

## Relief

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<sup>18</sup>The six special envoys are Cabinet Ministers Njeru Githae (Nairobi Metropolitan Minister), Sally Kosgei (Agriculture), Hellen Sambli (East African Community), Chirau Ali Mwakwere (Trade), George Saitoti (Internal Security) and assistant minister Richard Onyonka (Foreign Affairs).

<sup>19</sup> UN document S/2011/116, see OTP2011/000011856.

<sup>20</sup> See, for example, KBC, Raila wants “Ocampo Six” tried at The Hague, 20 February 2011 (<http://www.kbc.co.ke/news.asp?nid=69019>); The Standard, Civil society faults VP 'shuttle diplomacy', 09 February 2010 ([http://walalahoi.ning.com/profiles/blogs/remarks-by-the-rt-hon-raila-a?xg\\_source=shorten\\_twitter](http://walalahoi.ning.com/profiles/blogs/remarks-by-the-rt-hon-raila-a?xg_source=shorten_twitter)).

30. For the foregoing reasons, the Prosecution respectfully requests the Pre-Trial Chamber to deny the Applicant's request for assistance.



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Luis Moreno-Ocampo  
Prosecutor

Dated this 10<sup>th</sup> day of May 2011  
At The Hague, The Netherlands