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Pénale
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**International
Criminal
Court**

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

Date: 6 June 2011

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR *v.* WILLIAM SAMOEI RUTO, HENRY KIPRONO
KOSGEY, AND JOSHUA ARAP SANG**

Public Document

Prosecution's Consolidated Response to 'Observations on behalf of Henry Kiprono Kosgey' and the 'Defence Request to Strike 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"'

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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1. On 21 April 2011, the Kenyan Government filed its “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93 (10) and Rule 194” requesting the transmission of all statements, documents, or other types of evidence obtained by the Court and the Prosecutor in the context of the investigations into the Post-Election Violence in Kenya, including into the six suspects presently before the Court (“Request for Assistance”).¹ The Request for Assistance was largely based on two issues: 1) admissibility and 2) complementarity.
2. On 10 May 2011, the Office of the Prosecutor (“Prosecution”) responded to the issues presented in the Request for Assistance and filed 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” (“Prosecution’s Response”). The Prosecution opposed the relief requested on the basis that victims and witnesses could be put at risk by the disclosure of confidential material to the Kenyan Government.²
3. On 13 May 2011, Henry Kiprono Kosgey requested that the Chamber expunge the Prosecution’s Response.³
4. On 17 May 2011, William Ruto and Joshua Arap Sang jointly filed “Defence Request to Strike 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” (“Request to Strike”).⁴ The Request to Strike contained

¹ ICC-01/09-01/11, para. 2. Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93 (10) and Rule 194”.

² ICC-01/09-01/11-83. The Prosecution filed a corrigendum on 12 May 2011, ICC-01/09-01/11-83-Corr.

³ ICC-01/09-01/11-88, “Observations on behalf of Henry Kiprono Kosgey to the ‘Prosecution’s Response to ‘Request for Assistance on behalf of the Government of Kenya pursuant to Article 93(10) and Rule 194’”.

⁴ ICC-01/09-01/11-90. Defence Request to Strike the Prosecution’s Response to “Request for Assistance

allegations similar to those raised by Henry Kosgey (Ruto, Sang and Kosgey are referred to as “Applicants”).⁵

5. Collectively, the Applicants request that Pre-Trial Chamber II (“Chamber”) expunge or strike the Prosecution’s Response⁶ relying on three grounds, that it: 1) was incorrectly filed in the case, 2) exceeds the scope of the Request for Assistance, and 3) contains unfounded and prejudicial allegations against the Applicants. The Applicants argue that the Prosecutor violated ethical rules by relying on particular facts in writing and that the Chamber should 1) strike the Prosecution’s Response, 2) order the Prosecutor to formally apologise to the Applicants and 3) consider sanctioning the Prosecutor.
6. The Prosecution disputes the legal and factual basis of the Application, and requests that the Chamber consider the Prosecution’s Response. The grounds, proposed remedy and sanctions prayed for by the Applicants are devoid of legal and factual merit and should be summarily dismissed. The Prosecution will seek sanctions if the pattern of baseless accusations levelled against the Prosecution continues.

I. The filing of the Prosecution’s Response in the case (versus situation) does not require the Chamber to disregard the Prosecution’s Response

7. The basis for the Request to Strike the Prosecution’s Response appears to be that the response was filed improperly in the “Case” rather than in the “Situation”. This claim is frivolous.

on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194”.

⁵ ICC-01/09-01/11-90 Defence Request to Strike 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”.

⁶ ICC-01/09-01/11-83. 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”.

⁸ ICC-01/09-02/11-96, paras. 28-31

8. The basis for the request by Government of Kenya in its Request for Assistance was its purported domestic investigation; accordingly, the assistance was sought, in the words of the Applicant, to give effect to complementarity and ultimately to bolster its pending claim that the cases against the six Suspects are inadmissible. At the time the Request for Assistance was filed, the admissibility issue initiated by Kenya had been briefed and was ripe for decision in the Kenya Cases. The Applicant itself linked the request for assistance to the two pending admissibility decisions by urging the Chamber not to rule on the latter without having granted relief on the former. In this regard, it was appropriate for the Chamber when considering the admissibility issues raised in the two cases, to make a preliminary determination also to the issues presented by the Request for Assistance in order to dispel the contention that issues of complementarity were dependant on the fulfilment of request for cooperation under Part 9.⁸
9. In the alternative, if the Chamber believes that the Prosecution's Response was incorrectly filed, the remedy need not be striking the pleading altogether. Instead, the Prosecution requests that the Chamber order the electronic transfer of the filing from "the case" to "the situation". The composition of the Chambers overseeing the case and the situation is identical; the Registry staff is identical in both. The requested transfer will not cause prejudice to the parties, participants, the Government of Kenya, all of whom would have received the same notification had the submission initially been filed in the situation. It is undisputed that the Chambers possess the authority to regulate the proceedings. Article 64(3)(a) provides that the Trial Chamber may adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings. Likewise, these same powers apply

to the Pre-Trial Chamber⁹. Given that the transfer appears to facilitate the fair and expeditious conduct of the proceedings, the Chamber may exercise its authority to request the Registry to transfer the Prosecution's Response from the situation file to the case file should it deem appropriate to do so.

II. The Prosecution's Response did not exceed scope of the Government's Request

10. The Applicants' submission that the Prosecution's Response exceeded the scope of the Request for Assistance is wholly unjustified. The two-pronged Request sought (a) materials possessed exclusively by the Prosecution, and (b) materials obtained by the Prosecution, copies of which were provided to the Chamber. The Prosecution's response precisely addressed the scope of that Request.

11. As to the first prong, the Prosecution stated that it would not provide the requested materials to the Government of Kenya, explaining its rationale. On the second prong, the Prosecution urged that the Chamber deny the Request for materials within the Chamber's possession. Explaining its opposition, the Prosecution underscored its concern that confidential investigative information could be leaked, to the detriment of victims and witnesses in the present unstable environment within Kenya. Thus, the Prosecution's

⁹ See Article 64(3)(a), conferring this power on Trial Chambers; Although no equivalent provision expressly confers an equivalent power to the Pre-Trial Chamber, it generally accepted that international court and tribunals have an inherent power to regulate the proceedings before it. See for instance *Prosecutor v. Bobetko*, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge, Case Nos. IT-02-62-AR54 *bis* & IT-02-62-AR108 *bis* at 29, A. Ch., 29 November 2002, at para. 15; *Prosecutor v. Jelusic*, Decision on Request to Admit Additional Evidence, Case No. IT-95-10-A, A. Ch., 15 November 2000; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United States)*, Order of 14 April 1992, [1992] ICJ Rep. 3, at 113 (Judge El-Koshi, Dissenting Opinion) (courts have inherent power to ensure the proper administration of justice). In the context of the Rome Statute, these powers must be exercised within the limits of Article 21.

Response appropriately responded to the issues raised in the Request for Assistance, and did not exceed the scope of the Request for Assistance.

III. The Prosecutor Acted Ethically and in Good Faith

12. The Applicants' complaints against the Prosecutor are based on the Prosecution's selection of examples, and the source of that information. The Applicants inappropriately criticize the Prosecutor, misapplying the sources upon which they rely. This is an attempt to limit what the Prosecution chooses to put in written filings, in effect attempting to silence the Prosecution instead of focusing on the substantive issues at hand.

13. The Applicants' argument has no factual or legal merit. It is well recognized that the Prosecution is independent and as a party, at liberty to investigate and respond as it deems fit. As observed by the Appeals Chamber, "it is the Prosecutor who, pursuant to article 54 (1) of the Statute, is tasked with the investigation of crimes under the jurisdiction of the Court and who, pursuant to article 61 (1) and (3) of the Statute, proffers charges against suspects."¹⁰ Thus, the Prosecutor has the discretion to conduct the investigation as he wishes and select sources that he believes are appropriate.

14. The Prosecutor did not set forth unfounded allegations. To the contrary, the Prosecution set forth the factual basis for its assertions in a clear and transparent manner. In good faith, the Prosecution offered examples to support its concerns and represented those examples accurately. As such, there is nothing objectionable in the Prosecutor's Response.

¹⁰ *Prosecutor v. Lubanga*, Judgment on Regulation 55 Appeal, ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, para. 94

15. Further, nothing in the Prosecution's Response infringes on the Defence's fair trial rights or the integrity of the judicial process. The Prosecutor's mandate and powers under Articles 54(3)(f) and 68(1) of the Rome Statute require him to inform the Chamber when he has information that impacts the safety of victims and witnesses. The exercise of this mandate does not infringe on the Applicants right to a fair trial nor does it impact the integrity of the judicial system.
16. Moreover, the Chamber has a duty to protect victims and witnesses and therefore has an interest in receiving information pertinent to that duty. The Applicants argue that the Prosecution should have conducted a full-scale investigation into Ruto's unrelated corruption case before bringing it to the Chamber's attention. This claim is frivolous; the Prosecution's duty is to alert the Chamber to appropriate information, and to not mislead the Chamber. It performed that duty here – it provided the facts about Ruto's prosecution and acquittal, and it cited the sources of its information. It had no further mandate (or ability) to investigate the Kenyan proceeding, and particularly it had no mandate to remain silent on the matter until it completed a full investigation, thereby denying the Chamber access to clearly pertinent information in the meantime.
17. The course of action advocated by the Applicants would, in effect, foreclose the Prosecution from providing most, if not all, of the information related to the safety of victims and witnesses, as it would be impossible to meet that threshold. Consequently, the Chamber would be deprived of information that is the Prosecutor's possession, clearly a desirable result from the standpoint of the Applicants, but a result that would disadvantage the Chamber in fulfilling its duty to protect victim and witnesses.

18. The Applicants further urge that the Prosecution violated ethical rules and requests that the Chamber warn the Prosecutor and consider imposing sanctions against him. Their request is wholly unjustified.
19. No provision in the Statute or Rules authorizes the Chamber generally to regulate what the Prosecution submits in its filings, as the Applicants suggest, or to punish the Prosecutor for those filings. As long as the Prosecutor is fulfilling his mandate and acting in good faith, he has the right to respond as he wishes.
20. Nor did the Prosecution's Response violate any internationally accepted standard applicable to this Court. First, the Guidelines on the Role of Prosecutors cited by the Applicant are not applicable.¹¹ Even if they were applicable, nothing in the Prosecution's Response violated their proscriptions. The Prosecution's Response was premised upon its receipt of several pieces of information, including information derived from multiple and consistent media reports. In no way can the citation to that information be construed as pursuing unfounded charges.
21. In the same vein, the Applicants cite to the Code of Professional Conduct for Counsel¹² arguing that it applies to the Prosecutor. That is incorrect; the Code of Professional Conduct does not apply to the Prosecution. However, even if it did apply, nothing in the Prosecution's Response violated the Code. In particular, the Prosecution did not deceive or knowingly mislead the Chamber. To the contrary, it brought this information to the Chamber's attention to fulfil his mandate.

¹¹ ICC-01/09-01/11-90, para. 35.

¹² ICC-01/09-01/11-90, para. 37.

22. To buttress their arguments, the Applicants erroneously rely on several judicial decisions, including *Gotovina*¹³ and *Lubanga*¹⁴. The Applicants cite *Gotovina* for the premise newspaper articles as a rule do not constitute a reasonable evidentiary basis for the information contained therein. Their reliance on *Gotovina* fails to mention distinguishing facts and circumstances in that case. In particular, they omit that the *Gotovina* ruling applied to factual questions put to a witness at trial and the requirement that such questions have a demonstrably reasonable and accurate factual basis. Therefore, their proposition that newspaper articles can never be used misstates the law.
23. Here, the Prosecution has not offered evidence at trial or proffered unreliable newspaper reports falsely to prove inaccurate factual assertions. Moreover, though Applicants may disagree with the reasonable conclusion to be drawn from the facts, that tampering affected the Ruto verdict, they do not disagree with the facts themselves – that Ruto was prosecuted for fraud and was acquitted and after eighteen (18) prosecution witnesses were unavailable to testify.
24. Nor is there an analogy between this situation and the facts of the *Lubanga* decision concerning a press interview with a member of the Prosecution staff.¹⁵ The issue here does not involve an out of court statement regarding the good character of the Prosecution's witnesses made by an employee or the Prosecutor. It involves a written submission containing facts supported by a good faith basis. The Applicants appear to possess the mistaken belief that their disagreement with the facts or conclusions asserted by the Prosecution

¹³ ICC-01/09-01/11-90, para. 35.

¹⁴ ICC-01/09-01/11-90, paras. 38-40

¹⁵ ICC-01/04-01/06-2433, Decision on the press interview with Ms Le Fraper du Hellen.

automatically makes the Prosecution's assertions groundless. In an adversarial system, this cannot be the case.

Conclusion

25. The purpose and content of the Prosecution's Response was to bring to the Chamber's attention relevant information that has a direct impact on the Chamber's decision to grant or refuse the Request for Assistance. Because the Request for Assistance addressed the transmission of statements, documents or other types of evidence, the Prosecution's Response falls squarely within its scope and mandate to protect victims and witnesses.
26. The Prosecution therefore requests that the Chamber dismiss the Request to Strike in its entirety and consider the Prosecution's Response.
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Luis Moreno-Ocampo, Prosecutor

Dated this 6th day of June 2011

At The Hague, the Netherlands