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

Date: 14 June 2011

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF**

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

**PUBLIC**

**Defence Request for Leave to Reply to the ‘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:** Defence

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 the Defence**

Counsel for William Samoei Ruto:  
Kioko Kilukumi Musau, Joseph  
Kipchumba Kigen-Katwa, David Hooper,  
and Kithure Kindiki  
Counsel for Henry Kiprono Kosgey:  
George Odinga Oraro, Julius Kemboy  
and Allan Kosgey  
Counsel for Joshua Arap Sang:  
Joseph Kipchumba Kigen-Katwa, Joel  
Kimutai Bosek and Philemon K.B. Koech

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

Sir Geoffrey Nice  
Rodney Dixon

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia, Registrar

**Counsel Support Section**

**Deputy Registrar**

Mr. Didier Daniel Preira, Deputy  
Registrar

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. On 10 May 2011, the Prosecution filed its ‘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”’ in the Ruto et al case.<sup>1</sup> This filing was responding to the ‘Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194’, which had been filed in the Kenya situation.
2. On 13 May 2011, the Kosgey Defence filed its ‘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’.<sup>2</sup>
3. On 17 May 2011, the Ruto and Sang Defence filed its ‘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”’,<sup>3</sup> in which the Defence argued that the Prosecution response of 10 May 2011 had been improperly filed in the Ruto et al. case, and that the arguments contained therein exceeded the scope of the Government’s Request for Assistance, and should therefore be construed as an unauthorized attempt to file an additional response in relation to the Government’s admissibility challenge. In the alternative, the Defence submitted that the Prosecution arguments misconstrued article 93(10) and rule 194. The Defence also protested the Prosecution’s citation of unsubstantiated (and in several cases, unreferenced) allegations in a public filing.
4. On 6 June 2011 (i.e. 24 days after the Kosgey filing), without any prior judicial authorisation, the Prosecution filed its ‘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”’.<sup>4</sup>
5. The Prosecution filing of 10 May 2011 was the first time that the issue of the Government’s request for assistance was addressed in the Ruto et al case. The Defence therefore had the right to respond under regulation 24(1) of the Regulations of the Court.
6. However, notwithstanding its nomenclature, the Prosecution’s ‘Consolidated Response’ is essentially a reply to the arguments contained within the Kosgey, and

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<sup>1</sup> ICC-01/09-01/11-83-CORR

<sup>2</sup> ICC-01/09-01/11-88

<sup>3</sup> ICC-01/09-01/11-90

<sup>4</sup> ICC-01/09-01/11-108

Ruto and Sang filings, which were responding to the Prosecution's first filing on this issue in the Ruto et al. case namely, the Prosecution Response of 10 May 2011.

7. Regulation 24(4) of the Regulations of the Court provides that a "response [...] may not be filed to any document which is itself a response or a reply". Regulation 24 (5) further provides that "Participants may only reply to a response with the leave of the Chamber, unless otherwise provided for in these Regulations". The deadline for filing a reply is ten days.<sup>5</sup>
8. The Prosecution 'Consolidated Response' should therefore be dismissed on the basis that the Prosecution has, once again, flouted the procedural requirements by filing an unauthorised reply outside the deadline.
9. Nonetheless, should the Honourable Pre-Trial Chamber accept the Prosecution's Consolidated Response, the Defence of Mr. Ruto and Mr. Sang hereby request the leave of the Chamber to file a reply, on the following grounds.
10. In its 'Consolidated Response', the Prosecution argues that the Prosecution's duty towards victims and witnesses imbues it with the right to proffer any allegation in a public filing.<sup>6</sup> The Prosecution also makes several statements which misconstrue the arguments in the Ruto and Sang filing (for example, that the Defence stated that the Prosecution should have conducted a 'full scale' investigation into the corruption case, and that the Defence argued that the Prosecution was bound by the Code of Professional Conduct for Counsel). Finally, the Prosecution also threatens that "it will seek sanctions if the pattern of baseless accusations levelled against the Prosecution continues."<sup>7</sup>
11. The Defence therefore seeks leave to reply in order to:
  - firstly, bring to the attention of the Chamber jurisprudence from other Chambers concerning the fact that the Prosecutor's observations on witness and security concerns must have an objective and substantiated basis;
  - secondly, to clarify the Defence arguments which were misquoted and misconstrued by the Prosecution; and
  - thirdly, to present submissions on the extent to which the Prosecutor's threat to "seek sanctions' is an unwarranted attempt to deflect the Chamber's attention from the Prosecution's own conduct,

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<sup>5</sup> Regulation 34 (c).

<sup>6</sup> Consolidated Response at para 15.

<sup>7</sup> At para 6.

which seeks to intimidate the Defence from properly raising issues concerning violations of the defendants' rights before the Chamber.

12. Although the Regulations does not specify the grounds upon which a request for leave may be granted, the Defence notes that in accordance with the jurisprudence of the ICC, leave has been granted where the parties have shown 'good cause' in light of new arguments on facts and law, which the parties should have a right to respond to out of fairness.<sup>8</sup> Leave has also been granted where the issues were important, and could influence the further conduct of the proceedings.<sup>9</sup>
13. The question as to whether the Prosecution can use its duty to protect victims and witnesses as a vehicle for attacking the reputation and integrity of the Defendants, and is so doing, rely upon unauthenticated media reports as statements of facts, is an issue that is likely to arise in connection with all future witness protection requests. In general, due to the *ex parte* nature of such requests, the Defence will not have an opportunity to defend itself. It is therefore imperative that it be accorded a proper opportunity to reply to the Prosecution's attempt to justify its conduct.
14. Granting the Defence an opportunity to reply to the Prosecution's misstatement of Defence arguments will also assist the Chamber to render its decision.
15. Finally, article 6 of the Code of Professional Conduct requires Defence Counsel to defend their interests of their clients independently and freely, without any compromise caused by external pressure. Submissions concerning the extent to which the Prosecution's threat to seek sanctions will have a 'chilling effect' on the ability of the Defence to defend their client's interests in a manner which is consistent with Counsel's obligations under the Code of Conduct will assist the Chamber to implement its duty to oversee the fairness of the proceedings and respect for the rights of the Defence.

### **Relief Sought**

16. For the reasons set out above, the Defence respectfully requests the leave of the Pre-Trial Chamber to file a reply to the 'Prosecution's Consolidated Response to 'Observations on behalf of Henry Kiprono Kosgey' and the 'Defence Request to

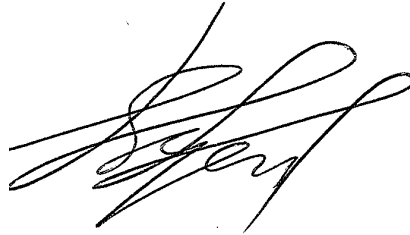
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<sup>8</sup> See for example, Prosecutor v. Bemba, Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, 27 November 2008, ICC-01/05-01/08-294.

<sup>9</sup> Prosecutor v. Mbarushimana Decision on the Prosecution's request for leave to reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material", 24 November 2011.

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'.

17. Pursuant to regulation 35(2) of the Regulations of the Court, the Defence further requests the Chamber to extend the deadline for filing the reply until five days after the Chamber has issued its decision granting the Defence leave to reply.



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Joseph Kipchumba Kigen-Katwa  
On behalf of Mr. Joshua Arap Sang and Mr. Mr. William Samoei Ruto

Dated this Tuesday, 14 June 2011

At Nairobi, Kenya