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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 CASES OF
PROSECUTOR v. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY, JOSHUA ARAP SANG and PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI

Public Document

APPLICATION ON BEHALF OF THE GOVERNMENT OF THE REPUBLIC OF KENYA PURSUANT TO ARTICLE 19 OF THE ICC STATUTE

Source: The Applicant, 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:

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A. Introduction: the process of fundamental reform

1. Your Applicant, the Government of the Republic of Kenya, submits this Application pursuant to Article 19(2)(b) and Article 17(1)(a) of the ICC Statute as a State which has jurisdiction over the Kenya Situation and the two cases currently before the ICC (ICC-01/09-01/11 and ICC-01/09-02/11). The Government of Kenya respectfull y requests the Pre-Trial Chamber to determine that both of these cases are inadmissible before the ICC in light of the information provided in this Application and that will be submitted to the Court.

2. The Government's Application must be determined with a full understanding of the fundamental and far-reaching constitutional and judicial reforms very recently enacted in Kenya. Following a Governmental campaign of national unity and reconciliation, and a nationwide referendum, a new Constitution was adopted in August 2010:

   - The new Constitution incorporates a Bill of Rights which significantly strengthens fair trial rights and procedural guarantees[1] within the Kenyan criminal justice system.

   - The Constitution gives effect to a comprehensive range of judicial reforms which fundamentally transform the administration of justice in Kenya. Deficiencies and weaknesses from the past have been specifically targeted to guarantee the independent and impartial dispensation of justice.

   - National courts will now be capable of trying crimes from the post-election violence, including the ICC cases, without the need for legislation to create a special tribunal, thus overcoming a hurdle previously a major stumbling block.

   - The new Constitution guarantees the independence of the State's investigative organs and ushers in wide-ranging reforms to the police services.

[1] For example, see Articles 49-51 of the new Constitution. A copy of the new Constitution together with all Acts, Bills, and Reports referred to in this Application will be provided to the Pre-Trial Chamber in a filing of Annexes that will follow the filing of this Application.

- An independent Commission for the Implementation of the Constitution is established to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution.

3. The Government accepts without reservation that it was not possible to seek to have the ICC Prosecutor's investigations deferred to the Kenyan authorities before the adoption of the new Constitution and the legislative and other reforms that have followed as a consequence.[2] The Government has at all times co-operated in full with the ICC and the Prosecutor in the investigations undertaken by the Prosecutor in Kenya.[3] Indeed, during this time the Government rejected the near unanimous Parliamentary vote for Kenya to withdraw from the ICC. The Government complied in every respect with its obligations under the ICC Statute as a State Party without, of course, relinquishing its sovereign right to investigate and try cases arising from the post-election violence in the national courts of Kenya. It is for this reason that the Government of Kenya did not refer the Kenya Situation to the ICC, but indicated to the Prosecutor that he may apply to open an investigation under Article 15.

4. The Government acknowledges all the criticisms and shortcomings that have been raised by national and international bodies of its judicial and investigative organs, many of which were relied upon by the Prosecutor in his request to open an investigation. They have all inspired and shaped the fundamental process of reform that has been embarked on by the Government since the events of 2007/2008, culminating in the adoption of the new Constitution and new legislation and practices. Moreover, the investigations and factual findings made by various national and international bodies are being relied on by the Kenyan authorities in conducting their investigations and must be taken as reliable and accurate for the purposes of investigations conducted by the Kenyan authorities.

5. The adoption of the new Constitution and associated reforms has opened the way for Kenya to conduct its own prosecutions in Kenya for the post-election violence in respect of persons at the highest levels of authority and for the most serious crimes. Now - the date of this Application - is the "earliest opportunity" for the Government to

[2] As the Pre-Trial Chamber will be aware, Kenya did not therefore request pursuant to Article 18 that the Prosecutor defer his investigations to Kenya and it has not at any earlier stage made any application to defer the Prosecutor's investigations.
[3] The Prosecutor has noted Kenya's co-operation, as have the States Parties through the President of the Assembly of States Parties, Mr. Christian Wenaweser - see ICC Press Report, 28 January 2011.

submit its admissibility application under Article 19. Kenya has acted with full respect for the provisions of Article 19(5). The recent and current initiatives have all been designed and adopted to cure problems, or shortcomings, of the past. They demonstrate that the time is ripe for Kenya to exercise jurisdiction which the ICC should yield.

6. In so doing both the ICC and Kenya will uphold, and remain faithful to, the cornerstone principle of the ICC, that of the ICC's jurisdiction being *complementary* to national criminal jurisdictions. The ICC does not enjoy primacy over Kenya's domestic jurisdiction. As emphasised by the President of the Assembly of States Parties, Mr. Christian Wenaweser, "States Parties had the primary responsibility and competence to ensure that there was no impunity for the most serious crimes under international law ... the ICC merely had a complementary role in cases where national proceedings were not effective".[4] He has thus encouraged the Government of Kenya to present its plans to establish "credible and effective national proceedings to the ICC's Pre-Trial Chamber" presently seized of the two cases.[5]

7. This call has been supported by Mr. Nicholas Westcott, EU Managing Director for Africa, when he stated on a recent visit to Kenya that, "The option exists that if there is a local alternative that is credible and would provide adequate judicial treatment of the accusations made against these people [the six suspects who have been summonsed by the ICC] then there is no need for the ICC to intervene".[6]

8. The Government of Kenya requests the Pre-Trial Chamber to take account of the immense challenges that it has confronted in the aftermath of the post-election violence in order to steer Kenya step by step to the point it has now reached of being able to exercise its sovereign right to investigate and try its citizens in the courts of Kenya. In only two years since the violence the Government in its coalition composition (with the obvious tensions that arise in such governments the world over) has managed to put in place the necessary reforms to investigate and try all cases at whatever level arising from the post-election violence.[7]

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[4] ICC Press release, 28 January 2011.
[5] *Ibid.*
[6] Report in Bloomberg Businessweek, 26 March 2011.
[7] The Government accepts the submissions made by the Prosecutor as to the background of his application to open an investigation as set out in his Request for Authorisation of an Investigation pursuant to Article 15, 26 November 2009, paras 1-22.

9. The process of reform and improvement is not complete, and nor could it realistically be expected that any democratic country could have transformed its judicial and police systems overnight. There have been differences and tensions in Government and in Parliament about the content and implementation of the reform process that have taken time to resolve and which may continue to an extent to characterise the unfolding process of reform. They should not be seen as inimical to this Application in any way but rather should be acknowledged as a sign of health in a modern, pluralistic, parliamentary democracy, especially one that has a coalition government (as a majority of countries around the world probably do). Tensions of any kind in such countries over particular issues take time to settle. It is submitted that it would be unreasonable and unrealistic to challenge Kenya's right, through its new investigative and judicial systems, to try its own citizens.

10. Kenya has been a State Party of the ICC and prominent supporter of the Court from the start. Kenya should be accorded the respect that it merits. It should not be treated as if an unwilling, non-cooperating State referred to the ICC by the Security Council of the UN. Yet that is how things may seem if, with its house already being put in order, Kenya is not allowed to finish the task and to investigate and try those at all levels, particularly those at the top of political, military and administrative hierarchies, who merit being tried. To challenge Kenya's right to try its own citizens in the present circumstances would send out the wrong message to countries that are seeking to strengthen their national jurisdictions to fulfil their obligations under the Rome Statute as well as to those States that are considering becoming parties to the Rome Statute. It could even be regarded as sending an inappropriate message to those major countries - including some permanent members of the Security Council - that have not ratified the Rome Statute and who face or will face in time moral pressure to join the ICC and to make it a court of truly universal jurisdiction.

11. It is submitted that to concentrate on the six named individuals will have the effect of letting it seem that by their standing trial in The Hague the whole tragic history of 2007/8 is put to rest. It is the Government's firm view that such an outcome would be most unfortunate. Only by trying people in Kenya itself, and ensuring an even-handed investigation and prosecution of all those on whom suspicion rightly falls, may the national process of dealing with the tragedy be properly balanced. Moreover, Kenya

itself trying *all* cases arising from the 2007/8 violence will certainly build public confidence in the police and the judicial process.

B. The Government's Application and the proposed procedure and timetable

Introduction

12. In this Application the Government of Kenya sets out the key reforms that have been undertaken and the investigative processes that are currently underway (see Part E below). On the basis of this information the Government submits that the two cases presently before the ICC are inadmissible.

13. The Government has fulfilled its obligation under the Statute to file its admissibility challenge at the "earliest opportunity" in compliance with Article 19(5) whilst recognising that further steps are being taken. As the processes of reform and the investigations of crimes will continue over the coming months, the Application also outlines in Part E below the steps that are being and will be undertaken in respect of all cases at all levels. The Government envisages that these steps will be completed within the next six months by September 2011.

Proposed timetable and procedure

14. The schedule of when these steps will be implemented is set out in Part E so that the Pre-Trial Chamber is fully apprised of the proposed timetable. The Government will be in a position to submit reports on the implementation of these reforms and investigative actions to the Pre-Trial Chamber and the parties by the dates identified, and to provide any other information required by the Chamber. The Prosecutor and parties should of course be permitted a sufficient opportunity to respond to the Application and subsequent reports submitted by the Government, with the Government being able to reply, where necessary, and provide further information as may be requested or required.

15. Such a procedure can readily be accommodated within the Rules which permit the Pre-Trial Chamber a wide discretion to determine the procedure for the consideration and determination of an application under Article 19. In particular, Rule 58 provides

that the Chamber "shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing."

16. In the Government's submission a final determination on the admissibility of the two cases can only properly be made once the Pre-Trial Chamber has had an opportunity to consider all of the steps undertaken by the Government, both those already in place as well as those that have been initiated and which will be completed progressively within the next six months.

17. This period will not delay proceedings:

- The Government's investigative organs will be undertaking investigations *during* this period. Reports on the progress made will be provided by the Government to the Pre-Trial Chamber.

- The Government hopes the Prosecutor may share the outcome of his investigations to date with the appropriate Kenyan authorities in order to assist the Kenyan investigations. The Government will be enthusiastic in exploring ways in which the Prosecution could continue to co-operate with the Kenyan authorities in the future.

- Initial appearances of the six suspects will take place on 7 and 8 April 2011. But for the present application, a further period of preparation of some months would *in any event* have had to be permitted by the Pre-Trial Chamber before further proceedings could take place before the ICC in respect of the confirmation of any charges.

18. The Pre-Trial Chamber should have in mind that other States have been given equivalent and in some cases more extensive periods of time to undertake their national investigations before any intervention by the ICC. Although the circumstances of each Situation will differ on their facts, the time required by Kenya is not at odds with the latitude that has been afforded other States.[8] Kenya should not be

[8] Three examples which involve allegations of serious crimes that either pre-date the post-election violence in Kenya or which occurred at a similar time are: (i) The Prosecutor publicly announced a preliminary investigation for Colombia in 2006 and since then the Office of the Prosecutor has made several official visits to assess the

placed in a position inferior to any other State which is the subject of the ICC's attention.

19. This Application is the first to be made under Article 19 by any State before the ICC. There is, thus, no ICC case law directly on point. The limited jurisprudence from cases in which "admissibility" has been considered in other circumstances indicates that the admissibility of a case should be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. The Court should consider whether there is any record of investigations or prosecutions at "the time of the proceedings".[9] The relevant period is thus when the application is being considered and determined as a whole and not merely the date on which the application is first filed, which would be artificial in the extreme. In the particular circumstances of Kenya's case it is only consistent with Statute, Rules and jurisprudence that the reform process as a whole, be taken into consideration before any final determination on admissibility is made by the Pre-Trial Chamber.

20. Furthermore, before any final determination of the present Application is made by the Pre-Trial Chamber, the Government of Kenya requests that an oral hearing is scheduled, in consultation with the parties, to permit the Government the opportunity to address the Pre-Trial Chamber in respect of its Application. The Application is plainly of vital importance to the national interest and future of Kenya and its people. It is particularly critical to the future course of judicial proceedings in Kenya, and is thus clearly a matter to be dealt with at a public hearing before the Pre-Trial Chamber so that all relevant arguments can be submitted and considered. (As noted above, this

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progress made with national investigations to determine whether the complementarity requirements of Article 17 have been met by the State. To date the Prosecutor has not applied under Article 15 to initiate an investigation (despite strong indications by experts that insufficient steps are being taken by the Colombian authorities; see "The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now?, Extended version of the Statement in the 'Thematic session: Colombia'", Prof. Kai Ambos, Professor Georg-August Universitat Gottingen, Judge Landger i chr Göttingen, and Florian Huber, Law Clerk State of Lower Saxony, Doctoral candidate Georg-August-Universität Göttingen, 5 January 2011). (ii) The Prosecutor publicly announced a preliminary investigation for Georgia on 14 August 2008 following the outbreak of hostilities between Russia and Georgia. The Prosecutor has since received communications from both Russia and Georgia on the national investigations being undertaken by each State. No further action has been taken by the Prosecutor as yet to bring these cases before the ICC. (iii) For Afghanistan no response has yet been received from the State to the Prosecutor's request for information. A preliminary examination was announced by the Prosecutor in 2007 but no application has been brought by the Prosecutor to bring the situation under the ICC's jurisdiction. The information in respect of these States has been obtained from the ICC website.

[9] *Prosecutor v Katanga and Chui*, Appeals Chamber, Judgment on the Appeal of Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, paras. 78-80.

is the first time that an application made by a State Party under Article 19 is being considered before the ICC.[10])

Status Conference

21. Accordingly, the Government proposes that a Status Conference be convened to discuss the timetable as set out in the Application and for submissions from the parties to be made on procedure so that the Pre-Trial Chamber can make orders and directions in accordance with Rules 58 and 59. Given the particular circumstances of Kenya's case, and as this is the first case in which the procedure for the consideration and determination of a challenge under Article 19 by a State will have to be decided, such matters should be addressed in detail at a Status Conference with written submissions from the parties in advance, if necessary.

Hearings on 7 and 8 April

22. In light of its Application under Article 19, the Government of Kenya is a party to the proceedings currently before the Pre-Trial Chamber. The Government requests that it be afforded a separate time allocation to have an opportunity to address briefly the Pre-Trial Chamber on one or both of the hearings' days of 7/8 April 2011, as the Court may decide in circumstances where the parties can be present.

C. Legal requirements under Articles 17 and 19

23. In the Preamble to the ICC Statute the States Parties emphasise "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". The same provision is included in Article 1 of the Statute. Primary responsibility for enforcing individual criminal responsibility for the violations of the crimes in the ICC's Statute rests on the States Parties. As the Preamble states, "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". Compliant with this duty Kenya adopted its *International Crimes Act* 2008, which came into force in January 2009 as one of the key reforms initiated in the aftermath of the post-election violence. This Act provides that the provisions of the Rome Statute shall have the force of law in Kenya

[10] See para. 19.

and that the courts of Kenya have jurisdiction to prosecute *all* of the crimes in the ICC Statute.[11]

24. It was intended by the States Parties that established the ICC that it should only supplement national investigations and prosecutions. Unlike the *ad hoc* International Tribunals for the former Yugoslavia and Rwanda established by the Security Council under Chapter VII of the UN Charter, the ICC does not have jurisdictional primacy over the national criminal justice systems of the States Parties. As the Prosecutor has stated, "The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognising the primary responsibility of States themselves to exercise criminal jurisdiction".[12]

25. The complementarity principle is further elaborated in Article 17(1) of the Statute. It provides that a "case" shall be inadmissible before the ICC where, *inter alia*, "the case is being investigated or prosecuted by a State which has jurisdiction over it ... unless the State is unwilling or unable genuinely to carry out the investigation or prosecution". If the State is able and willing genuinely and in good faith to investigate and prosecute the matter that is before the ICC, the ICC has no jurisdiction and must defer to the national jurisdiction.

26. The Prosecutor has recognised that "as a general rule, the policy of the Office of the Prosecutor will be to undertake investigations only where there is a clear case of failure to act by the State or States concerned".[13] Whatever the position in the past, there is now plainly no "clear case of failure to act" by Kenya; on the contrary, as set out below, all necessary steps have been and are being taken by Kenya to investigate and try all cases.[14] These initiatives must be supported in accordance with the Prosecutor's view that "the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success".[15]

[11] See in particular Articles 4 and 8.
[12] Paper on some policy issues before the Office of the Prosecutor, September 2003, p. 2.
[13] *Ibid.*
[14] See Parts D and E.
[15] *Ibid.*, p. 4.

27. The provisions of Article 17 reflect the need to respect the sovereignty and integrity of national criminal justice systems, a concern at the forefront of the negotiations preparatory to and the drafting of the Rome Statute.[16]

28. The Court should give due deference to all of these considerations when determining the admissibility of a case. When investigations or prosecutions are underway in the State, there should be a presumption that the case is inadmissible.[17]

29. No definition is included in the Statute for "unwillingness". Article 17(2) provides that "in order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following exist": (a) the proceedings are being undertaken "for the purpose of shielding the person concerned", (b) there has been "an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice", and (c) the proceedings "are not being conducted independently or impartially" and are being conducted in a mnner which is "inconsistent with an intent to bring the person concerned to justice". There is no sign of "unwillingness" on the part of Kenya to investigate and try cases (for the reasons explained below[18]). None of the factors provided for in Article 17(2) exist today in Kenya.

30. Article 19(2)(b) provides that challenges to the admissibility of a case on grounds referred to in Article 17 may be made by "a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted".

31. None of these provisions is defined in the Statute, and as this is the first application made under Article 19(2)(b), there is no applicable case law from the ICC. As noted above, from the limited jurisprudence on "admissibility" when considered in other

[16] States Parties have emphasised in more recent deliberations that "The Court is a court of last resort" and that "the principle of complementarity is integral to the functioning of the Rome Statute system and its long term efficacy" (Report of the Bureau on stocktaking: Complementarity, ICC-ASP/8/51, 18 March 2010, para. 3). In a resolution adopted at the ICC Review Conference in Kampala, the Assembly of States Parties stressed "the primary responsibility of States to investigate and prosecute the most serious crimes of international concern" and recognised "the desireability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level" (Resolution RC/Res.1, adopted at the 9th plenary meeting, 8 June 2010).
[17] *Commentary on the Rome Statute of the International Criminal Court* (Edited by O. Triffterer), 2nd Ed., p. 616.
[18] See Parts D and E.

circumstances, admissibility must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. The court will consider whether there is any record of investigations or prosecutions at "the time of the proceedings".[19]

32. The ICC case law has not authoritatively determined the meaning of the word "case" in Article 17(1).[20] It is significant that for the purposes of authorising an investigation under Article 15 in respect of the Kenya Situation the Pre-Trial Chamber held that the admissibility of the case before the ICC must be determined by whether (i) the *groups of persons* that are the likely to be the object of an investigation by the ICC and (ii) the *crimes* that are likely to be the focus of such an investigation, are being investigated or prosecuted before the national courts.[21] The Government accepts that national investigations must, therefore, cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC. The Kenyan national investigative processes do extend to the highest levels for all possible crimes, thus covering the present cases before the ICC.[22]

33. The Pre-Trial Chamber's factual findings on admissibility when it authorised the Prosecutor to initiate an investigation under Article 15, were that there was at that stage an absence of national investigations in relation to senior business and political leaders associated with the ODM and PNU for the most serious incidents. The Chamber noted the domestic investigations that were ongoing in Kenya but found that they were only in relation to minor offences committed by low level perpetrators, in particular as outlined in the February 2009 Report to the Attorney General of Kenya by the Team on the Review of Post□Election Violence Related Cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast, and Nairobi Provinces. The failed

[19] *Prosecutor v Katanga and Chui*, Appeals Chamber, Judgment on the Appeal of Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, paras. 78-80.
[20] *Prosecutor v Katanga and Chui*, Appeals Chamber, Judgment on the Appeal of Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, paras. 81-82 where the Appeals Chamber declines to make any ruling on the subject. In particular, the Appeals Chamber did not endorse the findings of Pre-Trial Chambers in the context of issuing warrants of arrest that national proceedings must encompass both the conduct and the person that is the subject of the case before the ICC (see for example *Prosecutor v Katanga*, "Decision on the evidence and information provided by the Prosecution for the arrest of Germain Katanga", ICC-01/04-01/07-55, 6 July 2007/8, para. 20).
[21] Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, paras. 182-187.
[22] See below paras. 67-79.

attempts to establish a special tribunal were also noted as a further indication of inactivity at that time.[23]

34. The determination by the Pre-Trial Chamber that the case was admissible when it authorised the Prosecution's investigation is of course without prejudice to any subsequent challenge to admissibility.[24] Most importantly,

- There have been significant developments since March 2010 when the decision was rendered. In particular, the adoption of the new Constitution in August 2010 and associated reforms has meant that Kenya is able to conduct national criminal proceedings for all crimes arising from the post-election violence.

- The investigations against low level perpetrators are the foundation for extending investigations to senior leaders associated with the ODM and PNU for the most serious incidents (as explained below[25]). Many international courts have used a "bottom up" approach in investigating the most serious violations, it being very difficult to start an investigation at the highest levels without a sound knowledge of the underlying crimes.

D. Overview of the background to the Application

35. In the wake of the post-election violence various investigative initiatives were established or authorised by the Government to find the truth of what happened and to put in place measures that would ensure that the tragic events were never repeated. Many international and national organisations also undertook investigations and reviews, and made constructive and helpful contributions.

36. The Government acknowledges the evidence gathered and factual findings made by all of these bodies, which have been and are essential to shaping the investigations conducted by the national authorities (as explained in Part E below). The Government also accepts, for the purposes of national Kenyan investigations the criticisms and recommendations raised in the reports of various national and international bodies, all

[23] Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, paras. 182-187.
[24] See *Prosecutor v Kony et al.*, Decision on admissibility of the case under Article 19(1) of the Statute, ICC-02/04-01/05, 10 March 2009, paras. 18, 25-29.
[25] See paras 67-79.

of which greatly assisted the Government in the reform process that has since been started.[26] The Government acknowledges the Pre-Trial Chamber's comments about the inadequacies of the Kenyan system that were made on basis of the available information before the Chamber at the time.[27]

37. The reform process was founded on the National Dialogue and Reconciliation initiative that was established by all of the parties following the violence in February 2008. That initiative agreed on the reform agenda, which included undertaking constitutional, legal and institutional reform, and addressing accountability and impunity. Three commissions were initially set up: (i) Commission of Inquiry into Post-Election Violence, (ii) the Truth, Justice and Reconciliation Commission, and (iii) the Independent Review Commission on the General Elections.

38. The Commission of Inquiry into Post-Election Violence (CIPEV) is the most relevant one for the present Application. It was set up by the Kenyan Government as an independent commission in May 2008 to investigate the facts surrounding the violence and make recommendations. It was chaired by Mr. Justice Philip Waki, a judge of Kenya's Court of Appeal and two international commissioners. It delivered its report in October 2008, which became known as the Waki Report. Various recommendations were made to Government for it to address in order that those responsible for the violence could be investigated and tried in Kenya.

39. The most important recommendations were as follows:

- The proposal by the Attorney-General of the establishment of an independent investigative arm, a Directorate of Criminal Investigations, that should be implemented. The Commission noted that a "flawed investigative process is the very antithesis of a successful prosecution" (pp. 453-454).

- A comprehensive reform of the Kenya Police Service and Administration Police should be undertaken immediately, including the complete revision of the Police Act and the establishment of an Independent Police Conduct

[26] The Prosecutor has referred to many of these reports in his Request for Authorisation of an Investigation pursuant to Article 15, 26 November 2009, paras 29-44.
[27] Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 186.

Authority. (The extensive reforms proposed are summarised at pp. 478-481, and further elaborated at pp. 429-442.) The Commission concluded that at the time "the chain of criminal justice system is generally weak and the weakest link is the investigative function. The weakness in the system impacts on the rule of law and therefore promotes impunity. Urgent corrective measures must therefore be taken" (p. 469).

- The Commission recognising the "real and genuine difficulties in investigating violence of such magnitude as took place after the 2007 elections", emphasised the need for steps to be taken to address such problems including the implementation of the *Witness Protection Act* 2008 which at the time remained untested (pp. 455-456).

- While commending administrative reforms undertaken within the Judiciary, the Commission recommended that "nothing short of comprehensive constitutional reforms will restore the desired confidence and trust in the judiciary" (p. 461). The enactment of a Judicial Services Bill which would guarantee financial and operational independence was emphasised.

- The establishment of a Special Tribunal for Kenya was proposed through the enactment of legislation. The Commission also recommended that the *International Crimes Bill* be fast-tracked (pp. 472-476).

40. In light of the serious criticisms identified in the Waki Report (and other reports), the Government set about addressing the recommendations made. A process of reform across all sectors, including the Judiciary and the police, was embarked on urgently, which culminated in the adoption of the new Constitution in August 2010. Two points must be highlighted:

(i) T he Government from the outset stated its intention to get its house in order so that trials could be conducted in Kenya - this intention has never changed.

(ii) It was always envisaged by the Government that all reforms would be implemented and operational within a year of the adoption of the new

Constitution i.e. by September 2011. In other words, within three years of the Waki Report.

It is the Government's submission that this time period was and is realistic and reasonable given the reconciliation, trust and co-operation that had to be built in a coalition government following the violence, and given the dramatic extent of the reforms and changes that had to be agreed and implemented. It is hard to imagine that any other State emerging from the turmoil that occurred in Kenya could have acted more speedily to be ready to conduct trials. As noted above, other States which have experienced armed conflicts and violence have required, and been given, longer periods by the Prosecutor to get their national systems in order.

41. Reports and recommendations were canvassed and received from various groupings and experts as to what reforms should be introduced. The Report of the Task Force on Judicial Reforms (known as the Justice Ouko Report) of July 2010 was relied upon extensively for the judicial reforms which were to be adopted in the new Constitution.

42. As these proposals were being debated and appropriate national action decided upon, the Government co-operated in all respects with the ICC while always maintaining that it retained its sovereign right to try all cases nationally.[28] Even when the Prosecutor announced in November 2009 that he would request authorisation to proceed with an investigation, the President and Prime Minister made it clear in a joint statement that they would continue to co-operate with the ICC but remained committed to discharge their responsibility under the Rome Statute to establish a local judicial mechanism to deal with the perpetrators of post-election violence.[29]

43. Prior to the adoption of the new Constitution in August 2010, efforts to pass legislation in the National Assembly to establish a Special Tribunal as recommended in the Waki Report failed. At that time, the necessary support could not be mustered in Parliament for the bill to be passed. It would be quite wrong to characterise this failure as inactivity across the whole of Government or as promoting impunity in any way. The new Constitution and other reforms were, at the time, in the process of being debated and finalised for enactment. The new Constitution and related reforms

[28] In particular an agreement was signed in September 2010 with the Registrar of the ICC to conduct investigations in Kenya.
[29] Statement of the President and Prime Minister of Kenya, 5 November 2009.

permit the problems of Parliamentary passage of legislation for a Special Tribunal to be bypassed. The courts of Kenya are now empowered to try cases involving international crimes, with all necessary safeguards being in place.[30]

44. Despite a near unanimous vote in Parliament for Kenya to de-ratify the ICC Statute after the Prosecutor had filed his applications for summons to be issued against the six suspects, the Government has stuck to its stated intention of realising these necessary reforms to ensure that trials can take place in Kenya. Its resolve has been widely supported by the international community:

- As noted above, the President of the Assembly of States Parties, Mr. Christian Wenaweser, has encouraged the Government to present its plans to establish "credible and effective national proccedings to the ICC's Pre-Trial Chamber".[31] Similar support has come from the EU.

- The African Union has unanimously supported Kenya's efforts to deal with perpetrators locally.

- Of the permanent five members of the Security Council, Russia and China have supported Kenya' efforts to obtain a deferral for one year from the Security Council in order to allow for investigations and trials to take place in Kenya.

- Although certain other members of the Security Council may not support a deferral under Article 16 of the Statute on the basis that the requirement of a threat to international peace and security is not fulfilled, they have indicated that the appropriate route is for Kenya to apply under Article 19 to the Pre-Trial Chamber.

[30] See below paras. 56-59.
[31] ICC Press release, 28 January 2011.

E. The reforms and investigative processes

Introduction

45. Articles 17 and 19 require, *inter alia*, that "the case" is being investigated by the national authorities. Any Application under these Articles must establish the investigative component. It must also be shown that the judicial system is independent and impartial (Article 17).

46. Both of these requirements need to be considered in the present Application in light of the fundamental process of reform in Kenya and the investigative processes that are underway. Each of these components will be considered in turn.

(i) Judicial capacity

47. The Government of Kenya is absolutely clear in its desire to have cases such as the present ones tried in Kenya for a range of reasons not least of which is that a country as successful and sophisticated as Kenya has - and is in the process of strengthening - a judiciary capable of dealing with such cases. The Government can now point to substantial reforms of the judiciary, from the appointment of a new Chief Justice down, that will enable crimes of the type concerned to be tried satisfactorily in Kenya. A series of democratic checks and balances that accord with international standards have been introduced and are in the process of being implemented to guarantee the independence and impartiality of the Judiciary and the administration of justice.

48. The foundation is the new Constitution, adopted in August 2010. It introduces sweeping changes throughout Government, the Legislature, the Judiciary, and in every sector of society. An outstanding feature is the introduction of a Bill of Rights in Chapter Four which recognises and protects human rights and fundamental freedoms, making them binding on all State organs and all persons. Any citizen has the right to institute court proceedings claiming that any right or freedom has been violated or threatened. These rights and their enforcement would be applicable in all criminal trials held in Kenya for crimes arising from the post-election violence.[32]

[32] In particular, see the rights in respect of access to justice, the rights of arrested persons and fair trial rights set out in detail in Articles 48-51 of the new Constitution.

49. Of decisive importance for this Application, the Constitution guarantees the independence of the Judiciary, making it subject only to the Constitution and not subject "to the control or direction of any person or authority" (Article 160(1)). A separate fund is created for the payment of the expenses of the Judiciary and remuneration of Judges is guaranteed and protected (Articles 160(3)(4) and 173). The tenure of office of the Judges of the superior courts is secured (Article 160(2)).

50. The Constitution establishes a Supreme Court for the first time in Kenya's history which is the supreme judicial organ for the interpretation and protection of the Constitution (Article 163). The *Supreme Court Bill* 2011 is in the process of being enacted which will provide for the appointment of Judges and the administration of the court. The Supreme Court is headed by the Chief Justice who is in charge of the Judiciary. The Office of the Chief Justice is created by the Constitution in such a way as to ensure that the Judiciary is headed by an independent senior Judge (Article 161). A new Chief Justice is currently being appointed by a competitive and public process in accordance with the procedure set out in the Constitution (Article 166(1), see below[33]). He or she will enjoy secure tenure of office for a maximum of ten years (Article 167).

51. Most importantly, the Constitution establishes an independent Judicial Services Commission (JSC), chaired by the Chief Justice, to "promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice" (Articles 171-172). It is charged with responsibility of recommending persons for appointment as Judges, including the Chief Justice. The Chief Justice shall be appointed by the President in accordance with the recommendation of the JSC, and subject to the approval of the National Assembly. All other Judges shall be appointed by the President on the recommendation of the JSC (Article 166(1)).

52. The *Judicial Services Act* 2011 has since been enacted to give full effect to these provisions. The Act increases the personnel of the Judiciary, streamlines organisational aspects, and manages all disciplinary matters. It establishes the National Council on the Administration of Justice which is charged with formulating

[33] Para. 60.

policy for and monitoring the administration of justice. Under Part III of the Act the JSC is set up and its powers are promulgated. The appointment of the JSC is itself a competitive process.

53. The Act sets out the procedure for the appointment of Judges that is competitive, open and transparent. A crucial new change is that the JSC has the power to vet judicial officers. A separate Act, the *Vetting of Judges and Magistrates Act* 2011, has been passed to provide for the vetting of Judges as well, whether already appointed or to be appointed. The new Constitution is the source of this innovation. It provides in section 23 of the Sixth Schedule that a mechanism and procedure be established to determine the suitability of Judges and Magistrates to serve in accordance with the values and principles of judicial authority.

54. The Act establishes a Vetting Board that is independent and in charge of the vetting process of existing and new Judges. The Board is to receive submissions and complaints when considering Judges from the Kenya Anti-Corruption Commission, the Public Complaints Standing Committee, the Kenya National Human Rights and Equality Commission, and the National Security Intelligence Service. Furthermore, the membership of the Board includes three non-Kenyan citizens and *at least one international member* shall serve in each panel of the Board that vets Judges.

55. The appointment and vetting of new High Court and Court of Appeal Judges has been prioritised with the necessary resources being provided to fulfil this objective. To facilitate the appointment of these new Judges an amendment will be promulgated to the *Judicature Act*. These Judges will enjoy secure tenure of office until retirement (Article 167(1)) and they may only be removed from office in accordance with the procedures laid down in Article 168 which can only be initiated by or through the JSC and must be referred to a specially appointed tribunal.

56. High Court Judges are most relevant to the present Application as the Constitution establishes a High Court and permits the High Court to try all serious crimes, including international crimes. Article 165(3) of the Constitution grants the High Court unlimited original jurisdiction in criminal and civil matters (except for the matters expressly reserved for the Supreme Court and other specialised courts pursuant to the provisions of Article 162(2) of the Constitution). This jurisdiction

extends to all serious crimes including the international crimes proscribed by the Rome Statute. Under the Constitution, a Court of Appeal is established and appeals will lie to the Court of Appeal from the High Court (Article 164). A further level of appeal will lie to the Supreme Court (Article 163), thus guaranteeing the rights of the accused to all of the necessary levels of appeal and review.

57. As noted above, the *International Crimes Act* 2008, which came into force in January 2009, gives effect to the Constitution in providing that the provisions of the Rome Statute shall have the force of law in Kenya and that the courts of Kenya have jurisdiction to prosecute all of the crimes included in the ICC Statute. In particular, Article 8 of the Act authorises the High Court to try persons alleged to have committed any offence under the Rome Statute if:

(i) that offe nce was allegedly committed in Kenya, or

(ii) at the time of the offence the person was a Kenyan citizen or was employed by the Government of Kenya, or the person was a citizen of a State engaged in an armed conflict against Kenya, or the victim of the alleged offence was a Kenyan citizen or a citizen of a State that was allied with Kenya in an armed conflict, or

(iii) the person is after the commission of the alleged offence present in Kenya.

58. Article 2(6) of the Constitution provides that "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution". As Kenya became a State Party to the Rome Statute upon ratification with effect from 15 March 2005, the provisions of the Statute were binding law in Kenya from that date. The period of the post-election violence in 2007/2008 is thus clearly covered by the application of the Rome Statute through this provision in the Constitution as well as by the provisions of the *International Crimes Act* 2008. Moreover, Article 50(2)(n) of the Constitution provides that an accused may be tried for an offence which was at the time of its commission either an offence under the law of Kenya or a crime under international law. The terms of the Constitution and the Act guarantee that there is no bar to the prosecution of crimes arising from the post-election violence.

59. In addition, Article 27(1) of the Constitution ensures that there is no immunity for any person on account of their official position as every person is equal before the law. Article 143(4) of the Constitution specifically provides that the President is not immune from prosecution for crimes for which he may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity, which would include the Rome Statute.

Proposed timetable for the Judiciary

60. A key position to be filled is that of the new Chief Justice (and that of Deputy Chief Justice). In accordance with the Constitution and the *Judicial Services Act* (which has been enacted) the post has been publicly advertised by the JSC and the period for nominations has now closed. An elaborate procedure as laid down in the Act for the JSC to vet the applicants and then to announce the nominations publicly. Thereafter, interviews will be held by the JSC and successful nominees referred to the President, who in consultation with the Prime Minister and subject to the approval of the National Assembly will appoint the Chief Justice and Deputy Chief Justice. Following this procedure it is expected that a new Chief Justice and Deputy will be appointed by the end of July 2011.

61. In the meanwhile, the appointment of Judges of the High Court and Court of Appeal has been prioritised. The JSC is currently undertaking the process of selecting persons for recommendation. As noted above, an amendment to Section 7 of the *Judicature Act* is being enacted to permit the nomination of the new Judges. It is expected that the appointment of the Vetting Board to vet Judges recommended by the JSC will take place by the end May 2011 in accordance with the *Vetting of Judges and Magistrates Act* 2011. Thereafter the Board will be in a position to vet the proposed Judges so that the JSC's recommendations can be submitted to the President for appointment by the end of July 2011. This procedure will be completed in time for trials to be initiated following the investigative processes that are set out below.[34] The aim would be to have at least a core group of appropriately qualified and vetted High Court Judges available to deal with cases arising from the post-election violence by the end of July 2011.

[34] Paras. 67-79.

62. The Government and the JSC will ensure to the greatest extent possible that there is no delay in finalising the appointment of appropriate Judges to conduct the trial proceedings once investigations have progressed to a point when persons will be charged. The period in which the appointment of Judges is being undertaken will not be wasted, as parallel to this appointment process, investigations will be taken forward (in accordance with the timetable and reporting to the Pre-Trial Chamber as set out below[35]). In order to give full effect to the essential reforms for the appointment of Judges it is necessary to ensure that all of the procedures are followed, thus guaranteeing the appointment of independent and qualified Judges who enjoy public confidence to try the cases concerned. It must also be taken into account that the appointment of international members to the Vetting Board, and having them in country and operational, does take longer than if the Board were only local.

63. In this period the *Supreme Court Bill* will be enacted so that the appointment of the Judges of the new Supreme Court can take place.

64. Accordingly, the Government of Kenya will be in a position to report to the Pre-Trial Chamber on the completion of each of these steps (i.e. the appointment of the Vetting Board, the appointment of the Chief Justice, the appointment of High Court and Court of Appeal Judges, and the passing of the *Supreme Court Bill*) by the end of July 2011. Thereafter, a further report can be submitted at the end of September 2011 in respect of progress made with the appointment of the new Judges for the Supreme Court and to cover the implementation of the previous appointments.

65. If for any reason these appointment and vetting processes take longer than forecast this will be explained immediately in the reports and further information submitted to the Pre-Trial Chamber. The Government is committed to moving the process along as rapidly as possible. Should further time be required it will be minimal.

66. As explained below[36], investigations will be continuing throughout this period. Reports on these investigations will be submitted to the Pre-Trial Chamber by end of July 2011 (especially in light of the appointment of the new Director of Public

[35] See paras. 67-79.
[36] See paras. 67-79.

Prosecutions which is expected by the end of May 2011), August 2011, and September 2011.

(ii) Investigative processes

67. A vital new post for the purpose of progressing the investigative process has been created under the new Constitution to direct and oversee all investigations and prosecutions, namely the Director of Public Prosecutions (DPP). This position had previously been filled by the Attorney-General. Under the new Constitution it has been separated from the AG's office to create a new office entirely independent of Government (as is common in most democratic systems) with all the necessary safeguards to guarantee independence of investigations and prosecutions at all levels.

68. Part 4 of Chapter 9 of the new Constitution establishes an independent office of the Director of Public Prosecutions. The most important provisions are:

- The DPP "shall have the power to direct the Inspector-General of the National Police Service[37] to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction" (Article 157(4)).

- The DPP shall have secure tenure of office for a term of eight years (Article 157(5)) and may only be removed from office on petition to the Public Service Commission[38] and by an appointed Tribunal in accordance with the procedure set out in Article 158.

- The DPP shall exercise State powers of prosecution and may "institute and undertake criminal proceedings against any person before any court ... in respect of any offence alleged to have been committed" (Article 157(6)).

- The DPP "shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her

[37] This is an independent Office established under the new Constitution to command the new National Police Service (see Articles 243-245, discussed below).
[38] This is an independent Commission established by the new Constitution to ensure that the public service is "efficient and effective", and is properly monitored including in respect of disciplinary matters (Articles 233-234).

powers or functions, shall not be under the direction or control of any person or authority" (Article 157(10)).

- The DPP must exercise his powers having regard to "the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process" (Article 157(11)).

69. It is accepted by the Government that the investigation of all cases, including those presently before the ICC, will be most effectively progressed once the new DPP is appointed, which is expected to be finalised in accordance with the provisions of the Constitution by the end of May 2011.[39] In the interim, the investigations that have already taken place in Kenya are continuing under the Directorate of Criminal Investigations. The Directorate will be revamped under the new Police Act (see below[40]) to serve the new DPP.

70. The findings and recommendations of the February 2009 Report to the Attorney General by the Team on the Review of Post-Election Violence Related Cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast, and Nairobi Provinces, are presently being taken forward by the Directorate. As was noted in this Report, the investigation processes were not concluded - they were a first stage. The Report clearly recommended that speedy investigations of all allegations were required, and in particular that co-ordination and resources were needed to achieve this objective.[41] As a result, investigators continue to be dispatched into the field to collect evidence and lay the groundwork for local trials. In addition, the investigations and findings of various international and national bodies, including the Waki Commission, are being relied upon to guide national investigations.

71. An updated report on the state of these investigations and how they extend upwards to the highest levels and to all cases, including those presently before the ICC, will be submitted by the end of July 2011. The report will also outline the investigation strategy which, as envisaged by the February 2009 Report, is building on the investigation and prosecution of lower level perpetrators to reach up to those at the

[39] The new position has been advertised, and the closing date for applications is 31 March 2011. An interview panel has been appointed which will nominate suitable candidates and forward their names to the President and Prime Minister to place before the National Assembly for consideration.
[40] See paras. 75-77.
[41] See pp. 41-43 of the Report (which is Annex 29 of the Prosecutor's request to open an investigation).

highest levels who may have been responsible. The experience of most international tribunals has been that it is by the pursuit first of suspects and offenders at a lower level - the "foot soldiers" of mass crimes - that higher level suspects fall for better consideration. In Kenya to date there have been investigations and prosecutions mostly of low level offenders involved in the 2007/8 violence. There is every reason to believe that continuing investigations under revived investigative systems pursuant to a "bottom up" exploration of what happened will be much to the advantage of the rule of law generally.

72. The report to be submitted at the end of July 2011 will cover the investigations undertaken by the new DPP and the timetable for further investigations. The structure of the new office and the manner in which investigations are being undertaken to ensure independence and efficiency will also be addressed.

73. The Government will also be in a position to report then on the progress made with seeking ways to co-operate with the ICC Prosecutor, assuming this is acceptable to him, for the transmission of the results of his investigations to the national authorities to assist in their investigations.

74. Further reports at the end of August and September 2011 on progress made with the investigations at all levels under the new office of the DPP will be provided to the Pre-Trial Chamber. As explained above[42], by this time the necessary judicial reforms will have been implemented for the investigations to take their course in prosecutions before the courts.

75. Alongside these initiatives, the reform of the police services is underway, as recommended in the Waki Report. Three bills, the *Police Bill*, the *Police Service Commission Bill*, and the *Police Oversight Bill* are all presently being considered. It is anticipated that they will be enacted by the end of August 2011. These Acts will substantially transform the police services, giving effect to the provisions in the new Constitution at Part 4 of Chapter 13 (Articles 243-246).

76. These provisions establish (i) the National Police Service which shall "strive for the highest standards of professionalism and discipline", "prevent corruption and promote

[42] See paras. 47-65.

and practice transparency and accountability", and comply with and respect human rights, fundamental freedoms and dignity; (ii) the Office of the Inspector-General of the National Police Service to be headed by the Inspector-General who enjoys secure tenure of office and cannot be directed by any authority or person in respect of "the investigation of any particular offence"; and, (iii) the National Police Service Commission which as an independent body shall be responsible for the appointment of persons to hold office in the Police Service and the exercise of disciplinary control over the Police Service.

77. The Commission for the Implementation of the Constitution has been asked to expedite the three police bills so as to ensure that these reforms are implemented as soon as possible.[43] As a result, the appointment of the new Inspector-General is expected around the end of August 2011.

78. In addition, the issue of witness protection, which had been identified as a major concern by the Waki Report, has been comprehensively addressed in the new *Witness Protection Amendment Act* 2010 (that has amended the *Witness Protection Act* 2008). Under 2010 Act an independent and autonomous Witness Protection Agency (WPA) has been created and funded to deal with all witness protection matters arising in investigations and trials. A UN consultant has assisted in setting up the WPA, training of staff has been undertaken, and regional and international links and cooperation have been built.[44]

Proposed timetable for investigative processes

79. Accordingly, the proposed timetable for the continuation of the necessary investigations and reporting to the Pre-Trial Chamber is as follows:

(i) End of July 2011 - report on investigations under the new DPP and how they extend up to the highest levels, and on the cooperation with the ICC Prosecutor in these investigations;

[43] As noted above this Commission was established under the Constitution to facilitate and oversee the implementation of the Constitution. It has been active in pushing forward the implementation of the reforms set out in the Constitution and will continue to do so over the coming months. Its work is governed by *The Commission for the Implementation of the Constitution Act* 2010.

[44] A full report on the capacity and operations of the WGA can be provided with the forthcoming reports to the Pre-Trial Chamber.

(ii) End of August 2011 - report on progress made with investigations to the highest levels, and on adoption of the three Police Bills and reorganisation of the police services, including the appointment of the new Inspector-General; and,

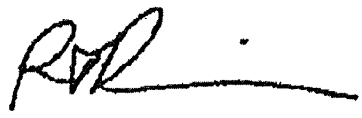
(iii) End of September 2011 - report on progress made with investigations and readiness for trials in light of judicial reforms.

F. Conclusion

80. For all of the reasons herein, and in light of all of the information submitted, or to be submitted, the Government of Kenya respectfully requests the Pre-Trial Chamber to find that the two cases presently before it are inadmissible.

81. The Government submits that the procedure to be followed to make a final determination of this Application should take into account the proposed timetable outlined in this Application. A Status Conference should be convened for the Government and the parties to address the Pre-Trial Chamber on the procedure to be adopted before any orders or directions are made by the Pre-Trial Chamber as to the procedure to be followed. The Government requests that such a Status Conference be convened as soon as practicable.

82. The Government requests that it be afforded a separate time allocation to have an opportunity to address briefly the Pre-Trial Chamber on one or both of the hearings' days of 7/8 April 2011, as the Court may decide in circumstances where the parties can be present.



Sir Geoffrey Nice QC

Rodney Dixon

Counsel on behalf of the Government of the the Republic of Kenya

Dated this 31st day of March 2011

London, United Kingdom