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SITUATION IN THE REPUBLIC OF KENYA

Public Document

**Request for Assistance on behalf of the Government of the Republic of Kenya
pursuant to Article 93(10) and Rule 194**

**Source: 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:

The Office of the Prosecutor

Legal Representatives of Victims

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

Sir Geoffrey Nice QC

Rodney Dixon

REGISTRY

Registrar

Silvana Arbia, Registrar

Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Request for assistance pursuant to Article 93(10) and Rule 194

1. The Government of the Republic of Kenya as a State Party hereby requests the assistance of and cooperation from the Court and the Prosecutor in respect of its national investigations into allegations of Post-Election Violence in Kenya pursuant to Article 93(10) and Rule 194.
2. The scope of the request is, as provided for in Article 93(10), for the transmission of all statements, documents, or other types of evidence obtained by the Court and the Prosecutor in the course of the ICC investigations into the Post-Election Violence in Kenya, including into the six suspects presently before the ICC.
3. The Government has informed the Court that it is conducting an investigation at all levels in respect of all persons against whom there may be allegations of participation in Post-Election Violence.¹ In accordance with Article 93(10) Kenya as a State Party is entitled to request that the Court and the Prosecutor provide to the appropriate Kenyan authorities the evidence in the possession of the Court and the Prosecutor to assist the Kenyan authorities in their national investigations and prosecutions.
4. The Government therefore requests the Registrar to transmit this request to the Court and the Prosecutor pursuant to Rule 194 as soon as practicable so that the Government of Kenya can use the materials requested expeditiously to advance its national investigations into all allegations of Post-Election Violence, including those in respect of the six suspects who are presently before the ICC.
5. As the Court and the Prosecutor will be aware, Kenya has filed a challenge to the admissibility of these two cases before the ICC pursuant to Article 19. It is imperative that all assistance and cooperation by the ICC is afforded Kenya in its national investigations so that it can in the shortest time possible advance and complete these investigations.

¹ See Application pursuant to Article 19 of 31 March 2011 and Filing of Annexes to the Application of 20 April 2011.

6. It would be contradictory to deny this request for support and assistance to Kenya at this time on the basis that the cases are being tried by the ICC when Kenya's request is for such cooperation to assist in the very national investigations that are the subject of the admissibility challenge. The principle of complementarity recognises that States Parties enjoy primacy and should only be denied the opportunity to exercise their sovereign national jurisdiction in the event that they are unwilling and unable to investigate and prosecute the cases concerned. The principle would be inverted were States Parties prevented from obtaining assistance from the Court and the Prosecutor in their national investigations in order, or with the result, that the ICC had exclusive jurisdiction of the cases concerned.
7. The Government of Kenya submits that its request for assistance should thus be resolved at the earliest opportunity, independent of - and certainly ahead of - the time when any decision on its Application under Article 19 is determined. The Prosecutor may well have possession of critical evidence unavailable to or not yet found by the Government of Kenya, and Kenya as a State Party fully supportive of the ICC is entitled to such evidence, the denial of which might be a means to belittle the Government's investigations.
8. The Government is ready to consult with the Court and the Prosecutor as envisaged in the Statute to seek to resolve any problems arising from its request in order to resolve such matters. No final decision by the Court or the Prosecutor should be taken on this request without hearing from the State Party concerned.
9. The Government emphasises that it has at all times fully co-operated with requests from the Court and the Prosecutor for assistance and support. It has at every turn fulfilled its obligations as a State Party.
10. As provided for in Rule 194, if protected measures have been adopted for any of the evidence requested, such measures can be considered before deciding on the request and necessary protective measures put in place, where justified, or arrangements made with the appropriate Kenyan authorities to ensure that the interests of victims and witnesses are protected in the national investigations in accordance with Kenya's laws and witness protection programs. As noted in the Application an elaborate witness

protection and support system has been adopted and is operational in Kenya (with the support of the UN and other countries).

A handwritten signature in black ink, appearing to read 'RD', followed by a horizontal line extending to the right.

Sir Geoffrey Nice QC
Rodney Dixon
Counsel on behalf of the Government of the the Republic of Kenya

Dated 21 April 2011
London, United Kingdom