

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09

Date: 29 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**

**Public**

**Decision on the Request for Assistance Submitted on Behalf of the Government  
of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of  
the Rules of Procedure and Evidence**

Decision 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

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**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**

Geoffrey Nice

Rodney Dixon

**REGISTRY**

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**Registrar & Deputy Registrar**

**Defence Support Section**

Silvana Arbia, Registrar

Didier Preira, Deputy Registrar

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

**PRE-TRIAL CHAMBER II** (the “Chamber”) of the International Criminal Court (the “Court”) renders this decision on a request for cooperation and assistance submitted by the Government of the Republic of Kenya (the “Cooperation Request”), under article 93(10) of the Rome Statute (the “Statute”) and rule 194 of the Rules of Procedure and Evidence (the “Rules”).<sup>1</sup>

## **I. Procedural History**

1. On 31 March 2010, the Chamber, by majority, issued its decision authorising the Prosecutor to commence an investigation into the situation in the Republic of Kenya (the “31 March 2010 Authorisation Decision”).<sup>2</sup>

2. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto (“Mr. Ruto”), Henry Kiprono Kosgey (“Mr. Kosgey”), Joshua Arap Sang (“Mr. Sang”), Francis Kirimi Muthaura (“Mr. Muthaura”), Uhuru Muigai Kenyatta (“Mr. Kenyatta”) and Mohammed Hussein Ali (“Mr. Ali”) to appear before the Court on 7 and 8 April 2011 respectively.<sup>3</sup>

3. On 21 April 2011, the Government of the Republic of Kenya filed into the record of the situation the Cooperation Request, in which it sought 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”.<sup>4</sup>

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<sup>1</sup> “The Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194”, ICC-01/09-58.

<sup>2</sup> Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, ICC-01/09-19-Corr.

<sup>3</sup> Pre-Trial Chamber II, “Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ICC-01/09-01/11-1; Pre-Trial Chamber II, “Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-1.

<sup>4</sup> ICC-01/09-58, paras 1-2.

4. On 3 May 2011, the Chamber ordered the Prosecutor to provide observations on the Cooperation Request, by no later than 10 May 2011 (the “3 May 2011 Order”).<sup>5</sup>

5. On 10 May 2011, the Prosecutor filed his observations on the Cooperation Request in the record of the two cases against the six suspects;<sup>6</sup> and on 12 May 2011, the Chamber received corrigenda thereto (the “Prosecutor’s Response”).<sup>7</sup>

6. On 13 May 2011, the Defence for Mr. Kosgey filed in the record of the case observations on the Prosecutor’s Response and requested the Chamber to expunge it (“Mr. Kosgey’s Request”).<sup>8</sup>

7. On 17 May 2011, the Defence of Mr. Ruto and Mr. Sang filed in the record of the case a joint application (“Mr. Ruto’s and Mr. Sang’s Joint Request”) requesting the Chamber to:

- i. [S]trike the Prosecution Response from the record of the Ruto et al case (and thereby disqualify the filing from the Chamber’s consideration in the admissibility challenge);
- ii. [S]hould the filing be refiled in the Kenya situation, order the Prosecution to formally apologise to the Defendants and withdraw all unfounded and prejudicial allegations; and
- iii. [C]onsider sanctioning the Prosecutor under article 71(1) of the Statute.<sup>9</sup>

8. On 18 May 2011, the Government of the Republic of Kenya requested leave to reply to the Prosecutor’s Response within 28 days. It also requested that the Chamber “consider[s] [its] Reply, once filed, before any final determination of the Admissibility Application is made and to render a decision on the [Cooperation Request] before a final determination is made of the Admissibility Application” (the “First Request for Leave to Reply”).<sup>10</sup>

<sup>5</sup> Pre-Trial Chamber II, “Order under Regulation 24(1) of the Regulations of the Court”, ICC-01/09-60.

<sup>6</sup> ICC-01/09-01/11-83; ICC-01/09-02/11-86.

<sup>7</sup> ICC-01/09-01/11-83-Corr and its annex ; ICC-01/09-02/11-86-Corr and its annex.

<sup>8</sup> ICC-01/09-01/11-88.

<sup>9</sup> ICC-01/09-01/11-90, p. 15 ; ICC-01/09-01/11-90-Anx.

<sup>10</sup> ICC-01/09-61, para. 13.

9. On 19 May 2011, the Defence of Mr. Ali filed in the record of the case an application requesting leave to reply to the Prosecutor's Response ("Mr. Ali's Request").<sup>11</sup>

10. On 31 May 2011, the Government of the Republic of Kenya requested the Chamber to rule on the First Request for Leave to Reply before deciding on the merits of the Cooperation Request (the "Government's Second Request for Leave to Reply").<sup>12</sup>

11. On 6 June 2011, the Prosecutor filed the "Consolidated Response to 'Observations on behalf of Henry Kiprono Kosgey' and the 'Defence Request to Strike the 'Prosecution's Reponse' to 'Request for Assistance on behalf of the government of the Republic of Kenya pursuant to Article 93(10) and Rule 194'" (the "Prosecutor's Consolidated Response").

12. On 14 June 2011, the Defence for Mr. Ruto and Mr. Sang requested leave to reply to the Prosecutor's Consolidated Response and a five-day extension to file the reply should the Chamber grant the request ("Mr. Ruto's and Mr. Sang's Second Joint Request").<sup>13</sup>

## II. Applicable Law

13. The Chamber notes articles 93(10)(a),(b)(i)(a), (ii) and 96 of the Statute, rules 121(2)(c), and 194 of the Rules, regulations 24(1), (5) and 34(c) of the Regulations of the Court (the "Regulations"), and regulations 21 and 22 of the Regulations of the Registry.

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<sup>11</sup> ICC-01/09-02/11-93.

<sup>12</sup> ICC-01/09-62.

<sup>13</sup> ICC-01/09-01/11-129.

### III. Determinations on the Documents Filed by the Parties in the Relevant Cases

14. At the outset, the Chamber wishes to point out that the Government of the Republic of Kenya triggered the proceedings regarding the Cooperation Request by way of filing it in the record of the situation. This, in principle, means that any filing submitted by a party or participant as a follow up to the Cooperation Request must be registered in the record of the situation.

15. In this context, the Chamber observes that following the 3 May 2011 Order, the Prosecutor filed his Response to the Cooperation Request in the record of the two cases instead of that of the situation.<sup>14</sup> In response, the Defence for Mr. Ruto, Mr. Kosgey, Mr. Sang and Mr. Ali advanced a number of observations and requests in filings registered in the record of the relevant cases.

16. With respect to Mr. Ruto's and Mr. Sang's Joint Request as well as Mr. Kosgey's and Mr. Ali's Requests, the Chamber considers that they lack the procedural standing to submit these filings. The fact that a party to the proceedings erroneously filed a document in the record of the case does not mean that the other party should follow robotically the same path. When the Defence of the suspects received the Prosecutor's Response, it was clear that the Government's Request was filed in record of the situation, and that accordingly, they were not entitled to be notified of these filings. As such, they were not and continue not to be interested parties to these particular proceedings, and thus, lack *locus standi* to reply to the Prosecutor's Response or put forward any request. For these reasons, the Chamber must disregard the submissions of the said Defence teams and dismisses their requests *in limine*.

17. The scenario, however, differs with regard to the Prosecutor's error. Unlike the situation of the Defence, the Prosecutor is actually an interested party in these proceedings and his Response was triggered in compliance with an order of the

<sup>14</sup> ICC-01/09-01/11-83-Corr and its annex; ICC-01/09-02/11-86-Corr and its annex.

Chamber issued on 3 May 2011. Thus, the fact that the Prosecutor's Response was filed in the record of the two cases is not of itself a material error, which would prompt the Chamber to disregard it. That said, it must be clarified that this line of reasoning cannot be applied to the Prosecutor's Consolidated Response, which was triggered by filings that should, in any event, not have existed, and was presented to the Chamber after the expiry of the deadline provided for in regulation 34(c) of the Regulations. Accordingly, the Chamber must equally disregard the Prosecutor's Consolidated Response and dismisses *in limine* the requests related thereto. This, in turn, requires the Chamber to also dismiss *in limine* Mr. Ruto's and Mr. Sang's Second Joint Request.

18. As to the Kenyan Government's requests for leave to reply, the Chamber notes that in the First Request for Leave to Reply, the Government made clear that the reliefs sought were mainly to be considered in view of and for the sake of being heard before the admissibility challenge had been decided.<sup>15</sup> When the Chamber decided upon the admissibility challenge on 30 May 2011 (the "30 May 2011 Decision"), the Government of Kenya submitted the Second Request for Leave to Reply. In this submission, the Government of Kenya requested the Chamber "to rule on its Application of 18 May 2011 for Leave to Reply to the [Prosecutor's Response] before the Chamber renders its decision on the merits of the [Cooperation Request]". Since the Chamber has already decided upon the merits of the admissibility challenge in its 30 May 2011 Decision, the Government's First Request for Leave to Reply, which it linked to the Chamber's impending admissibility determination, has become moot. Thus, to continue requesting leave to reply to the Prosecutor's Response, before the Chamber's determination on the Cooperation Request, is in reality an *ex novo* request.

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<sup>15</sup> ICC-01/09-61, paras 9-10

19. Therefore, the actual request before the Chamber at this juncture is whether to grant the Government leave to reply to the Prosecutor's Response "before the Chamber renders its decision on the merits of the [Cooperation Request]".<sup>16</sup>

20. In this regard, the Chamber notes that in its Second Request for Leave to Reply, the Government of Kenya argues that it seeks leave in order to prevent a scenario where the Chamber relies on the Prosecutor's allegations concerning the security of victims and witnesses in "refus[ing]" the Cooperation Request.<sup>17</sup> Elsewhere in the Second Request for Leave to Reply, the Government proceeded by stating that:

Only by being allowed to reply to the Prosecutor's grave, but un-evidenced, allegations can [it] ensure there is a record before the court of what its *present* response to those allegations may be, something of great potential importance for the deliberations of the Appeals Chamber and/or the Pre-Trial or Trial Chamber(s) at a later stage.<sup>18</sup>

21. The Chamber wishes to stress that, in making a judicial ruling, it does not rely on a single factor. Rather, the Chamber reaches its finding after having examined and weighed the different factors available in the case *sub judice*. Thus, even if the Prosecutor invoked security concerns, the Chamber does not have to give weight to such claim, unless it is convinced of its merit.

22. In any event, the statement made by the Government of Kenya in the last paragraph of the Second Request for Leave to Reply does not justify granting it. To request a leave to reply for the sake of ensuring that "there is a record before the court" concerning the Prosecutor's allegations as this "may be something of great potential importance for the deliberations of the Appeals Chamber and/or the Pre-Trial or Trial Chamber(s) at a later stage", is not persuasive. Should the Kenyan Government see a direct link between the Prosecutor's allegations and the 30 May 2011 Decision subject to appeal, it may directly address the Appeals Chamber. As to

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<sup>16</sup> ICC-01/09-62, para. 1.

<sup>17</sup> ICC-01/09-62, para. 4.

<sup>18</sup> ICC-01/09-62, para. 5.

the reference to the potential significance of keeping a record of these allegations for a determination by “Pre-Trial or Trial Chambers at a later stage”, the Chamber believes that this argument is flawed and premature. These arguments could be raised by the Government before the relevant Chamber at the appropriate juncture. Moreover, the issue of witnesses and victims security changes over time depending on the facts as they present them themselves and what the Prosecutor currently alleges may cease to be valid in the future. Thus, it is the Chamber’s view that the arguments advanced by the Government to justify granting the Second Request for Leave to Reply are not convincing. The Chamber, therefore, rejects the Second Government’s Request for Leave to Reply.

23. Having decided the procedural matters related to the present decision, the Chamber shall now turn to examine the merits of the Cooperation Request.

#### **IV. Determinations on the Cooperation Request**

24. In its 30 May 2011 Decision, the Chamber decided to “rule on the merits of the Cooperation Request in a separate decision”,<sup>19</sup> after having considered that “a determination on the inadmissibility of a case pursuant to article 17 of the Statute does not [necessarily] depend on granting or denying a request for assistance under article 93(10) of the Statute”.<sup>20</sup>

25. The Chamber recalls that in the Cooperation Request, the Government sought the Court’s assistance in the form of receiving “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”.<sup>21</sup> According to the Government, this will assist the national authorities in conducting and advancing their investigations

<sup>19</sup> ICC-01/09-01/11-101, para. 35; ICC-01/09-02/11-96, para. 31.

<sup>20</sup> ICC-01/09-01/11-101, para. 34; ICC-01/09-02/11-96, para. 30.

<sup>21</sup> ICC-01/09-58, p. 3.

and prosecutions into the Post-Election Violence, including those involving the Suspects.<sup>22</sup>

26. In this respect, the Chamber points out that although the Government of Kenya refers in general terms to article 93(10) as a legal basis for the Cooperation Request, the language used in formulating the Request is almost identical to the wording of article 93(10)(b)(i)(a) of the Statute. Thus, the Chamber considers that the Cooperation Request is based on this particular sub-paragraph of the provision.

27. The Chamber recalls article 93(10)(a) and (b)(i)(a) of the Statute, which reads:

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, *inter alia*:

- a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; [...]
- b. [...]

(ii) In the case of assistance under subparagraph (b) (i) a:

- a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;
- b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

28. The Chamber also recalls rule 194 of the Rules, which further elaborates on the procedures to be followed with respect to an article 93(10) request. Rule 194 of the Rules reads:

1. In accordance with article 93, paragraph 10, and consistent with article 96, *mutatis mutandis*, a State may transmit to the Court a request for cooperation or assistance to the Court, either in or accompanied by a translation into one of the working languages of the Court.
2. Requests described in -rule 1 are to be sent to the Registrar, which shall transmit them, as appropriate, either to the Prosecutor or to the Chamber concerned.
3. If protective measures within the meaning of article 68 have been adopted, the Prosecutor or Chamber, as appropriate, shall consider the views of the Chamber which ordered the measures as well as those of the relevant victim or witness, before deciding on the request.
4. If the request relates to documents or evidence as described in article 93, paragraph 10 (b)(ii), the Prosecutor or Chamber, as appropriate, shall obtain the written consent of the relevant State before proceeding with the request.
5. When the Court decides to grant the request for cooperation or assistance from a State, the request shall be executed, insofar as possible, following any procedure outlined

<sup>22</sup> ICC-01/09-58, p. 3.

therein by the requesting State and permitting persons specified in the request to be present.

29. A literal reading of article 93(10) of the Statute makes clear that the Court is under no obligation to comply with a cooperation request submitted by a State. This is evident from the usage of the verb “may” in the opening of article 93(10)(a) of the Statute. However, this interpretation should not, in any way, be construed as if the Chamber will automatically reject all requests as such. Rather, it implies that the Chamber shall rule on such requests after having properly scrutinised it together with any relevant material in support, in accordance with the related requirements set out in articles 93(10) and 96 of the Statute together with rule 194 of the Rules.

30. The Chamber is of the view that ruling on a request for cooperation and assistance under article 93(10) of the Statute is confined to instances where the request is addressed to the Chamber as in the present case or where the Court’s statutory provisions requires the Chamber’s intervention. An example of the latter is referred to in rule 194(3) and (4) of the Rules. The Chamber adopts this interpretation because a request under article 93(10) of the Statute may be also addressed to different organs of the Court, namely the Office of the Prosecutor. This is clear from the usage of the term “Court” in this provision and in rule 194 of the Rules, which also makes particular reference to the Prosecutor in its second, third and forth sub-rules.

31. It follows from this interpretation that the Chamber cannot order the Prosecutor to provide any material or evidence in his “possession” to any State, pursuant to a request under article 93(10) of the Statute, as this is a matter that falls entirely within his power. It also follows that the Chamber can grant a request for cooperation and assistance *only* in relation to material or evidence in its actual “possession”. This poses the question as to when it can be considered that the material or evidence is in the Chamber’s possession.

32. The Chamber considers that any material submitted by the Prosecutor to it is deemed in its possession. The Chamber is also of the view that the evidence communicated to the Chamber, in accordance with rule 121(2)(c) of the Rules and as a result of the process of disclosure, is in its possession. This practically means that the Chamber shall rule on the Cooperation Request with respect to the material and evidence in its possession and in light of the legal parameters dictated by law as outlined below.

33. Thus, for the purposes of granting the Cooperation Request, the Chamber considers that the following requirements must be satisfied. Firstly, the requesting State Party (Kenya) must have, at least, either conducted an investigation, or be doing so with respect to “conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State”. This entails that the requesting State Party must show that it is at a minimum investigating or has already investigated one or more of the crimes referred to in article 5 and defined in articles 6-8 of the Statute. Alternatively, the State Party must demonstrate that it is either doing or has done so with respect to conduct constituting “a serious crime under the national law”. Secondly, the request must satisfy the remaining relevant requirements set out in articles 93(10) and 96 of the Statute, as well as rule 194 of the Rules as the case may be.

34. With respect to the Cooperation Request *sub judice*, the Chamber considers that the Government of Kenya has not satisfied the first requirement of the test, namely that there is or has been an ongoing investigation with respect to either “conduct” constituting a crime set out in article 5 of the Statute, or in relation to “a serious crime under the national law of the requesting State”. The Government submitted to the Chamber a two-page Cooperation Request, which lacked any documentary proof that there is or has been an investigation, as required pursuant to article 93(10)(a) of the Statute. In view of the unsubstantiated Cooperation Request, the Chamber

cannot but reject it, without need to further develop the remaining requirements referred to in paragraph 33 of the present decision.

**FOR THESE REASONS, THE CHAMBER, HEREBY**

**a) dismisses *in limine*:**

Mr. Kosgey's Request;

Mr. Ruto's and Mr. Sang's Joint Request;

Mr. Ali's Request;

The Prosecutor's Consolidated Response; and

Mr. Ruto's and Mr. Sang's Second Joint Request;

**b) rejects the First Request for Leave to Reply;**

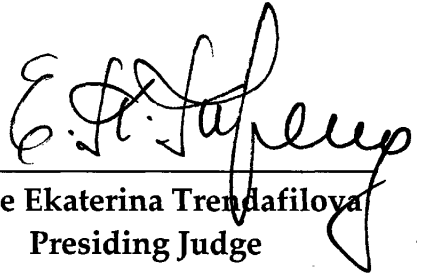
**c) rejects the Second Request for Leave to Reply;**

**d) rejects the Cooperation Request;**

**e) orders** the Registrar to transfer the following documents into the record of the situation: ICC-01/09-01/11-83; ICC-01/09-02/11-86; ICC-01/09-01/11-83-Corr and its annex ; ICC-01/09-02/11-86-Corr and its annex; ICC-01/09-01/11-88; ICC-01/09-01/11-90; ICC-01/09-01/11-90-Anx; ICC-01/09-02/11-93; ICC-01/09-01/11-129;

**f) orders** the Registrar to notify this decision to the Government of the Republic of Kenya.

Done in both English and French, the English version being authoritative.



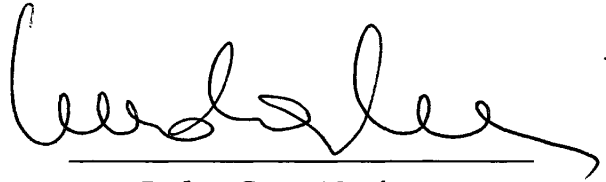
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Judge Ekaterina Trendafilova  
Presiding Judge



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Judge Hans-Peter Kaul  
Judge



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Judge Cuno Tarfusser  
Judge

Dated this Wednesday, 29 June 2011

At The Hague, The Netherlands