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Date: 4 July 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 Document

Government of Kenya's Application for Leave to Appeal the "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"

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:

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Victims and Witnesses Unit

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Other

A. Introduction

1. The Government of Kenya respectfully submits this application before Pre-Trial Chamber II under Article 82(1)(d) of the Statute for leave to appeal against the “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,” dated 29 June 2011 (the “Cooperation Request Decision”).¹
2. The Government of Kenya submits that the Pre-Trial Chamber committed three serious errors: (i) an error of fact in holding that the Cooperation Request “*lacked any documentary proof that there is or has been an investigation*”²; (ii) an error of procedure by not allowing the Government of Kenya to reply to the Prosecutor’s Response to the Government of Kenya’s Cooperation Request of 10 May 2011³; and (iii) an error of law in holding that the Chamber could not order the Prosecutor to provide any material or evidence in his possession to a State pursuant to a request under Article 93(10)⁴.
3. The Government of Kenya has today filed its Appeal against the Cooperation Request Decision with the Appeals Chamber pursuant to Article 82(1)(a) which provides the Government with an automatic right of appeal to the Appeals Chamber. This Appeal covers the same errors that are the subject of the present application for leave to appeal.
4. The Government of Kenya’s primary submission is that no leave is required to have its appeal heard by the Appeals Chamber. The Government of Kenya files the present application for leave in the event that the Appeals Chamber does not accept this submission, and on the basis that the requirements of Article 82(1)(d) are satisfied in that the errors concern issues that would significantly affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeal

¹ ICC-01/09-63 (hereinafter “Cooperation Request Decision”).

² Cooperation Request Decision, para. 34.

³ “Prosecution’s Response to ‘Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194’”, ICC-01/09-01/11-83 and ICC-01/09-02/11-86, 10 May 2011, paras. 5-8, 16-27 (hereinafter “Prosecution Response of 10 May 2011”).

⁴ Cooperation Request Decision, paras 30-31.

Chamber may materially advance the proceedings.⁵ There are no provisions in the Statute or Rules of the Court which prevent the Pre-Trial Chamber from granting leave in the event that the requirements of Article 82(1)(d) are met.

B. Submissions

5. The Government of Kenya seeks leave to appeal on the basis of errors of fact, procedure and law, each of which satisfies the requirements of Article 82(1)(d).

Factual errors

6. It was a fundamental error of fact for the Pre-Trial Chamber to hold that the Government of Kenya failed to satisfy the requirements of Article 93(10)(a) because the Government's "two-page Cooperation Request, ... lacked any documentary proof that there is or has been an investigation."⁶
7. The Government of Kenya *did* provide the Chamber with evidence and information which shows that the Government of Kenya is conducting an ongoing investigation into Post-Election Violence including the six ICC Suspects. At paragraph 3 of the Government of Kenya's Cooperation Request, the Government of Kenya clearly and expressly stated that **"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."**⁷ The Government of Kenya directed the Pre-Trial Chamber to the documents and materials the Government had filed with the Chamber which provided the Chamber with evidence of the Government of Kenya's ongoing investigation.⁸ Footnote 1 of the Cooperation Request referred the Chamber to the Government of Kenya's Admissibility Application filed on 31 March 2011 which informed the Court that there is an ongoing investigation.⁹ Additionally, footnote 1 of the Cooperation Request asked the Chamber to consider the documentary evidence provided to the Court in the

⁵ As provided for in Article 82(1)(d).

⁶ Cooperation Request Decision, para. 34.

⁷ Cooperation Request of 21 April 2011, para. 3.

⁸ Cooperation Request of 21 April 2011, fnt 1.

⁹ Admissibility Application of 31 March 2011, paras. 4, 12, 13, 17, 33, 35, 36, 46, 66, 71, 72, 74, 79.

Filing of Annexes of 21 April 2011,¹⁰ filed the same day as the Cooperation Request, which provided the Chamber with documentary evidence of the ongoing investigation in Kenya, including a letter from the Attorney-General and a lengthy report on the thousands of cases concerning Post-Election Violence.¹¹

8. The Government of Kenya provided further documentary proof that a national investigation was currently underway in its Reply of 13 May 2011. In this Reply the Government of Kenya detailed the background, history and status of the current investigation,¹² and annexed documentary proof of the investigation through letters, statements and progress reports about the investigation from the Director of Public Prosecutions, the Commissioner of Police, and the Director of Criminal Investigations.¹³ This documentation confirmed that the six Suspects were “being exhaustively investigated by the CID/CPP team” and described to the Chamber the investigative actions that were in progress.¹⁴ If the Chamber was not convinced by the documentary evidence of an investigation provided by the Government of Kenya, the Chamber could have heard directly from the Commissioner of Police in charge of the investigation.¹⁵
9. The materials that evidenced an ongoing investigation into Post-Election Violence at all levels, including in respect of the six Suspects and also in respect of the thousands of other suspects, was undoubtedly before the Pre-Trial Chamber. The Cooperation Request did not lack documentary proof of an investigation to satisfy the requirements of Article 93(10)(a). The Chamber chose to ignore this evidence and in effect rely on a highly technical reason to reject the Cooperation Request – that the materials were not appended to the Cooperation Request. The materials were expressly referred to in the Cooperation Request, and the materials were before the Chamber. It cannot be said that the Chamber was unaware of the Government of Kenya’s submission that an investigation was ongoing. It is overly technical in the extreme to reject the

¹⁰ Filing of Annexes of Material to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, ICC-01/09-01/11-64 and ICC-01/09-02/11-67, 21 April 2011 (hereinafter “Filing of Annexes of 21 April 2011”).

¹¹ Filing of Annexes of 21 April 2011, Annex 1, 2, 3. It should be taken into account that the Government of Kenya requested evidence from the ICC that may be relevant to *all* cases, not only the six Suspects.

¹² Reply on behalf of the Government of Kenya to the Responses of the Prosecutor, Defence, and OPCV to the Government’s Application pursuant to Article 19 of the Rome Statute, ICC-01/09-01/11-89 and ICC-01/09-02/11-91, 13 May 2011, paras. 37-60 (hereinafter “Reply of 13 May 2011”).

¹³ Reply of 13 May 2011, Annex 1, 2, 6. See also, Reply of 13 May 2011, paras. 57, 58.

¹⁴ Reply of 13 May 2011, para. 56

¹⁵ Reply of 13 May 2011, para. 7; Application for an Oral Hearing Pursuant to Rule 58(2), 17 May 2011, para. 20, 21.

Cooperation Request on the basis that the evidence must be appended to the Cooperation Request. If the Chamber had believed this was required, it could have asked the Government of Kenya to submit, once again, all of the evidence with the Cooperation Request before it ruled on the Request. It would have been a duplicative and unnecessary process, but the Government could then at least have had a fair chance to have the substance of its Cooperation Request considered by the Chamber. The decision of the Chamber instead shows what some or many may see as the Chamber's absolute determination to find a way of rejecting the Government's Request. To be perceived as vulnerable to such treatment by the very court Kenya has supported from its creation is embarrassing or humiliating for Kenya and potentially unfortunate for the future of the Court. Kenya is entitled to be treated with respect and its assertions are not to be circumvented by procedure or treated as worthless without evidence and reason.

10. The Chamber's factual errors significantly affect the fair and expeditious conduct of the proceedings. It is manifestly unfair to refuse the Government of Kenya access to ICC evidence when an investigation is plainly ongoing, and when the ICC evidence may be evidence that the Kenyan authorities could not discover. The Admissibility Application - *properly considered* - is, of course, not at all dependent on receiving the ICC's evidence. The Application's strength is to be determined by assessment of what the Government of Kenya is doing, an assessment - the Government of Kenya says - the Pre-Trial Chamber has never *properly* attempted. The danger arising from the Pre-Trial Chamber and the Prosecutor's failure and refusal to provide evidence in the Court's possession to the Government of Kenya is that Kenya's inability to act on such evidence in its own investigation may *seem* to weaken the Admissibility Application in the minds of the Court. On proper analysis, unless it can be shown that the evidence in the Prosecutor's possession is also in the Government of Kenya's possession - *or ought to have been* - then it would be quite wrong *and unjust* for the refusal to provide evidence to serve to "weaken" the Application, in perception or at all in any way.
11. The Cooperation Decision would require the Government of Kenya to file a new request for assistance together with all of the evidence of the national investigation. This procedure would cause unnecessary delays. It would also not permit the matter to be determined while the admissibility challenge is being decided before the Appeals

Chamber. Instead, an immediate resolution of the issue by the Appeal Chamber would materially advance the proceedings. Were the Appeals Chamber to decide that the Pre-Trial Chamber had committed a factual error, it could overrule the Chamber's decision and decide whether the Government of Kenya should be granted access to the ICC's evidence.

Procedural errors

12. The Pre-Trial Chamber committed a serious procedural error in refusing the Government of Kenya an opportunity to reply to the Prosecutor's Response to the Cooperation Request of 10 May 2011. The Government of Kenya filed its application for leave to reply on 18 May 2011. It made a further filing on the issue on 31 May 2011, a day after the Admissibility Decision in which the Chamber had indicated that a separate decision on the Cooperation Request would be delivered.¹⁶ *This was not a new request for leave.* It repeated the same request for leave for the same reasons. It was filed in order to emphasise that the Government of Kenya was requesting that the application for leave to reply of 18 May 2011 be decided in a separate ruling before the Chamber made its ruling on the merits. The Government had made the same request in respect of its application for an oral hearing for its Admissibility Application (i.e. to decide on the application in a separate decision before rendering the final decision on the Admissibility Application), but the Chamber refused its application for an oral hearing in the same decision on the merits of the Admissibility Application. The Government of Kenya wished to have a right of appeal should the Chamber refuse its application for leave to reply of 18 May 2011 *before* the merits of the Cooperation Request were decided.

13. The Pre-Trial Chamber rejected the Request for Leave to Reply of 18 May 2011 on the basis that it held that the "reliefs sought were mainly to be considered in view of and for the sake of being heard before the admissibility challenge has been decided"¹⁷. The Chamber reasoned that because it had decided the admissibility challenge, the application for leave to reply had become "moot". This decision is illogical and irrational. The Government of Kenya had applied for leave to reply on **18 May 2011** – this was 12 days *before* the Chamber issued its Admissibility Decision on **30 May**

¹⁶ ICC-01/09-01/11-101, para. 35; ICC-01/09-02/11-96, para. 31.

¹⁷ Cooperation Request Decision, para. 18.

2011. The Chamber did not decide the application for leave until after it issued its decision on admissibility, but used the fact that it had issued its decision on admissibility as the very reason to refuse the application for leave to reply. Once again, it shows that the Pre-Trial Chamber was determined to reject all applications filed by the Government of Kenya.

14. Moreover, the Government of Kenya never suggested that it needed to reply to establish the link between the Admissibility Application and the Cooperation Request. It needed to reply to address the issues that were relevant to the determination of the Cooperation Request itself. The Government of Kenya sought leave to reply to address the various submissions and allegations made by the Prosecutor in his Response to the Cooperation Request, including (i) the Prosecutor's erroneous assertion that Kenya had not established that there was an ongoing national investigation and (ii) the Prosecutor's argument that a request for materials solely within the possession of the Prosecution is not subject to judicial determination under Article 93(10) and Rule 194.¹⁸ Both of these issues were directly relevant to the outcome of the Cooperation Request as the Pre-Trial Chamber rejected the Cooperation Request based on a lack of evidence of a national investigation¹⁹ and agreed with the Prosecutor's argument that materials in the possession of the Prosecution are not subject to judicial determination.²⁰ The Chamber thus adopted the Prosecutor's arguments without giving the Government of Kenya an opportunity to first reply to them.

15. The Chamber also rejected the Government of Kenya's request of 31 May 2011. The Chamber characterised this filing as "an *ex novo* request". Yet, as plainly stated in the filing of 31 May 2011 the Government of Kenya was only asking the Chamber to decide on its existing application for leave to reply of 18 May 2011 before it rendered its decision on the merits of the Cooperation Request.²¹ In this filing the Government of Kenya did not therefore raise or rely on any different reasons for seeking to reply to the Prosecutor's Response. Its reasons for seeking a reply were as before – to address all of the arguments put forward by the Prosecution, and not only those concerned

¹⁸ Request for Leave to Reply of 18 May 2011, paras. 9, 11.

¹⁹ Cooperation Request Decision, para. 34.

²⁰ Cooperation Request Decision, para. 31. The Pre-Trial Chamber stated 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."

²¹ See Request of 31 May 2011, para. 1.

with alleged security concerns and witness intimidation. The Pre-Trial Chamber, however, erroneously referred only to the allegations of security concerns. It focused in on one paragraph in the filing (about ensuring that there was a record before the Court in response to the Prosecutor's allegations of witness intimidation) to find that the arguments raised by the Government did not justify granting leave to reply.²² The Chamber ignored that the Government sought leave to reply to the Prosecutor's argument that no investigation was underway – obviously a material issue as the Chamber relied on it to refuse the Cooperation Request.

16. These procedural errors affect the fair and expeditious conduct of the proceedings as they have denied the Government of Kenya the opportunity to reply to the arguments that were relied on to reject the Cooperation Request. An immediate resolution by the Appeals Chamber could materially advance the proceedings in that it would permit the Appeals Chamber to consider the Cooperation Request in light of the Government of Kenya's full submissions and to decide (taking into account the other errors relied on by the Government of Kenya) whether the Request should be granted. This procedure would ensure that the Cooperation Request was determined in the course of deciding the admissibility challenge.

Errors of law

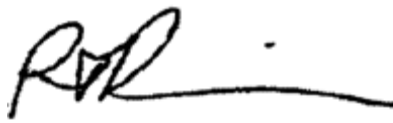
17. The Pre-Trial Chamber found that it could not oblige the Prosecutor to disclose evidence in his possession to a State pursuant to Article 93(10). The Government of Kenya requests that the Pre-Trial Chamber grant leave for this important legal issue to be decided by the Appeals Chamber. It has not previously been determined. Rule 194 expressly envisages that a request under Article 93(10) can be conveyed to the Prosecutor, which must imply that a decision in respect of such a request could require compliance on the part of the Prosecutor. The Government of Kenya's request was made to both the Court and the Prosecutor.
18. This legal issue affects the fair and expeditious conduct of the proceedings in that if the Prosecutor could be directed to disclose evidence in his possession it would mean that this evidence was capable of being provided to the Government of Kenya by the Prosecutor without delay. A decision by the Appeals Chamber in favour of the

²² Cooperation Request Decision, para. 22.

Government of Kenya would ensure that the proceedings in relation to accessing this evidence were advanced while the admissibility proceedings were ongoing.

C. Conclusion

19. For these reasons the Government of Kenya respectfully requests the Pre-Trial Chamber to grant leave to the Government to appeal against the errors of fact, procedure and law as proposed in this Application.



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

Dated 4th July 2011
London, United Kingdom