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**International
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Court**



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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge CunoTarfusser

SITUATION IN THE REPUBLIC OF KENYA

PUBLIC

Prosecution's Response to "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10), Article 96 and Rule 194"

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. On 16 September 2011 the Government of the Republic of Kenya (“the Applicant”) requested “all statements, documents and other evidence in the possession of the Court in the Situation in the Republic of Kenya and in the two Kenya cases currently before the ICC, namely cases ICC-01/09-01/11 and ICC-01/09-02/11.”¹ The Request specifically seeks unredacted versions of all confidential information disclosed between the parties and contained in the transcripts from the confirmation hearing.
2. The Prosecution opposes the Request to the extent that it seeks confidential prosecutorial documents it submitted to the Court.
3. The Request is no more than a reiteration of the Applicant’s previous request for confidential materials arising from the case. Previously the Applicant sought confidential materials in the possession of the Prosecution. The Prosecution objected then on security grounds. The Chamber held that it could not order the Prosecutor to provide any material or evidence in his possession.² The Application again seeks the same materials, this time from the Court. The Prosecution continues to believe that currently the suspects have the ability to influence the Government of Kenya policy and that any information provided to the Kenyan authorities can be used to attack victims and witnesses. Absent confidence that disclosure to the national authorities will not jeopardize persons connected with the crimes under investigation, the Chamber must deny the Request.
4. Additionally, the Request fails to satisfy the remaining requirements for the granting by the Chamber of a request for assistance pursuant to Article 93(10), Article 96 and

¹ “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10), Article 96 and Rule 194” (“the Request”), ICC-01/09-79.

² ICC-01/09-63, para 31.

Rule 194.³ In particular, the submissions provided, together with the accompanying annexes, fail to satisfy the requirement of specificity, relevance and necessity for the granting of a cooperation request.⁴

5. Finally, the Application continues to belie a fundamental misapprehension by the Government of Kenya that the Chamber is obligated to provide cooperation in order to allow States to exercise their responsibility “[u]nder the principle of complementarity” and “to assist the Kenyan authorities in their national investigations and prosecutions of all those suspected of involvement in the Post-Election Violence”.⁵
6. This Chamber has previously held that “the request for assistance has no linkage with the issue of admissibility”;⁶ “a determination on the inadmissibility of a case pursuant to article 17 of the Statute does not depend on granting or denying a request for assistance under article 93(10) of the Statute”;⁷ “a State may exercise its national jurisdiction by way of investigating or prosecuting, irrespective of and independent from any investigative activities of the Prosecutor”; “[t]hese domestic proceedings should be in principle carried out without the assistance of the Court”⁸; and “national investigative activities are conducted independently from this Court and based on the national laws of the Republic of Kenya”.⁹

³ ICC-01/09-63, para 33.

⁴ ICC-02/05-03/09-170, para. 14.

⁵ ICC-01/09-79, paras. 3 and 19.

⁶ ICC-01/09-02/11-96, para. 30.

⁷ ICC-01/09-02/11-96, para. 30.

⁸ ICC-01/09-02/11-96, para. 30.

⁹ ICC-01/09-02/11-340, para. 12.

Submissions

7. In its decision on the Applicant's first request for assistance pursuant to article 93(10), the Chamber held that it can grant a request for cooperation and assistance only in relation to material or evidence in its actual "possession". It considered that this occurs when any material is submitted to it by the Prosecutor or as a result of the disclosure process.¹⁰ The Chamber, moreover, recalled the discretionary wording of article 93(10).¹¹ The following requirements were set out by the Chamber for the granting of a request in relation to material in its possession:

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.¹²

A. Requirements of Article 93(10)

8. Article 93(10) requires as a pre-condition for the sharing of information, *inter alia*, that the transmission of statements, documents or other types of evidence provided

¹⁰ ICC-01/09-63, paras. 31-32.

¹¹ ICC-01/09-02/11-96, para. 31; ICC-01/09-63, para. 21.

¹² ICC-01/09-63, para. 33.

by witnesses or experts shall be subject to the provision of article 68, dealing with the protection of victims and witnesses.

9. For the reasons previously submitted by the Prosecution, there continues to be a tangible risk that the provision of confidential information related to evidence provided by victims and witnesses will jeopardize the safety and well-being of persons or the cases before this Court, in contravention of article 68.¹³
10. As the Prosecution noted in other filings,¹⁴ the current situation in Kenya poses significant security concerns. The Prosecution does not believe that the governmental structure presently can provide the necessary protection of witnesses, potential witnesses, suspected witnesses, family members, and victims. To the contrary, the Prosecution continues to receive reports that persons living in Kenya face threats, intimidation, and other attempts to discourage their participation in the investigation. This includes publication of information about alleged witnesses on the internet and veiled public threats and incitement by associates of the suspects.¹⁵
11. Accordingly, while the Prosecution supports a proactive cooperation with States that are conducting genuine investigations and prosecutions, and in accordance with its positive complementarity policy, it will assist and support a State in any genuine investigation. However, its assistance must be subject to the requirements of the Statute, and in particular article 68 governing the protection of victims and witnesses. The Prosecution continues to consider that in the current situation, the transmission of confidential unredacted materials provided to the Court by the

¹³ ICC-01/09-02/11-86-Corr, paras. 5-9.

¹⁴ For example ICC-01/09-01/11-2, para. 4; ICC-01/09-01/11-3-Conf-Exp; ICC-01/09-02/11-5-Conf-Exp; ICC-01/09-01/11-56; ICC-01/09-02/11-101-Red, para.14; ICC-01/09-02/11-136-Red, para. 15; ICC-01/09-02/11-203-Red, para.14; ICC-01/09-02/11-225-Red; ICC-01/09-02/11-279, para. 12.

¹⁵ For example ICC-01/09-02/11-86-Corr, paras. 17-28; ICC-01/09-01/11-127. The legal representative of the victims also referred to these practices: ICC-01/09-01/11-T-12-ENG ET, page 16, lines 5-18 and page 27 line 1 to page 29 line 5.

Prosecution or disclosed by the parties as well as unredacted transcripts of the proceedings to the Applicant would pose an unacceptable risk to persons as well as to the Prosecution's ongoing investigations.

B. Existence of national investigations

12. The Prosecution submits that even if there were no overriding security concerns, the Applicant does not establish the existence of national investigations sufficient to justify its request for assistance.
13. The Applicant continues to assert that it is conducting an investigation 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" as required by article 93(10), thus satisfying the first pre-requisite. In support, it submits three annexes that purport to demonstrate ongoing investigations.¹⁶ These documents, however, were previously filed (two in this Chamber and one in the Appeals Chamber) and were inadequate when originally filed and continue to be inadequate.
14. Annex 1 is a document previously filed by the Government of Kenya as annex 3 to its article 19 challenge in the two cases.¹⁷ With respect to this annex, "a 78-page progress report including data on Post Election Violence cases in six provinces, submitted by the Chief Public Prosecutor and other State counsels to the Attorney General of the Republic of Kenya", the Chamber observed that "[n]owhere in this report is there the slightest mention of the names of one or more of the three suspects subject to the Court's proceedings in the present case."¹⁸

¹⁶ ICC-01/09-79, Annex 1-3.

¹⁷ ICC-01/09-01/11-64-Anx3; ICC-01/09-02/11-67-Anx3.

¹⁸ ICC-01/09-01/11-101, para. 65; ICC-01/09-02/11-96, para. 61.

15. Annex 2 is a document previously filed as annex 2 to the Government of Kenya's reply to the Responses of the Prosecutor, Defence, and OPCV to the Government's article 19 challenges in both cases.¹⁹ It is a four page report dated 5 May 2011 and signed by the Director of Criminal Investigation. The Chamber previously held that although the information provided in the report reveals that instructions were given to investigate the suspects subject to the Court's proceedings, "the Government of Kenya does not provide the Chamber with any details about the asserted, current investigative steps undertaken".²⁰ Specifically, the Chamber observed that the report does not provide any information about the time or content of statements said to have been taken by investigative teams, nor does it explain or show "any concrete step that has been or is being currently undertaken". The Chamber also observed that the report "lacks information about dates when investigations, if any, have commenced against the three suspects, and whether the suspects were actually questioned or not, and if so, the contents of the police or public prosecutions' reports regarding the questioning" and that the Government of Kenya "also fails to provide the Chamber with any information as to the conduct, crimes or the incidents for which the three suspects are being investigated or questioned for. There is equally no record that shows that the relevant witnesses are being or have been questioned."²¹

16. Annex 3 is a document previously attached to a filing by the Government of Kenya before the Appeals Chamber.²² The Appeals Chamber dismissed this filing and its annexes *in limine* as falling outside the scope of the appeal without ruling on its content.²³ While the report consists of a statement by the Director of Criminal

¹⁹ ICC-01/09-01/11-89-Anx2; ICC-01/09-02/11-91-Anx2.

²⁰ ICC-01/09-02/11-96, para. 64; ICC-01/09-01/11-101, para. 68.

²¹ ICC-01/09-02/11-96, paras. 64-65; ICC-01/09-01/11-101, paras. 68-69.

²² Annex 1 of its Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility, ICC-01/09-01/11-159-Anx1.

²³ ICC-01/09-01/11-234; ICC-01/09-02/11-202.

Investigations that certain investigative steps have been taken, it does not provide proof of concrete investigative steps against the suspects as required by the Chamber in its Decision,²⁴ such as the identity of the persons who were allegedly questioned and the content of their statements. The report is also inconsistent to the point that it cannot prove that there is an active investigation proceeding. For instance, while stating, on the one hand, that “[f]ive witness statements were taken from persons who [...] alleged that there has [sic] been meetings attended by Mr Ruto in which arming persons to commit violence was discussed and planned”, the same report claims contradictorily that “none of the persons interviewed to date confirmed that any of these meetings took place” and that “[t]o date no evidence has been received [...] which could link any of the [ICC suspects] to the crimes as alleged by the ICC Prosecutor”.²⁵

17. The three annexes collectively show that some investigative steps appear to have taken place in Kenya, but the Applicant continues to provide only generalised assertions as to whether 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”. This lack of information hampers the ability of the Chamber, as a precondition for the granting of access to confidential materials in the record of the case, to discern in relation to which specific conduct or crime the Request is being made.

C. Requirements of article 96 and rule 194

18. The Chamber must also be satisfied that the remaining requirements of article 96 and rule 194 are met. As Trial Chamber IV has held in relation to the requirements of article 96, which according to rule 194(1) apply *mutatis mutandis* to requests from

²⁴ ICC-01/09-02/11-96, paras. 64-65; ICC-01/09-01/11-101, paras. 68-69.

²⁵ ICC-01/09-01/11-159-Anx1, p.2. See ICC-01/09-02/11-168, para. 35; ICC-01/09-01/11-183, para. 35.

States to the Court, cooperation requests must be founded on the requirements of (i) specificity, (ii) relevance and (iii) necessity.²⁶

19. As Trial Chamber IV elaborated, specificity of requests for cooperation is central to the cooperation regime under Part 9. In addition to specifying the type of assistance that is required, the request needs to include the information detailed in Article 96, including that the request contain as much detailed information as possible about the documents and include a concise statement of the essential facts underlying the request.²⁷ In this regard, the Chamber held that any request for the production of documents must, *inter alia*, identify specific documents and not broad categories; be identified as far as possible and be limited in number; and not be unduly onerous, in the sense that the request cannot seek to obtain hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the requested party would be overly taxing and not strictly justified by the exigencies of the trial.²⁸

20. The Prosecution notes that while the Applicant identified a number of specific documents or categories of documents that have come to the Government's notice,²⁹ these are presented as non-exhaustive examples; its broadly stated request is for provision of "[a]ll confidential unredacted materials which have been provided by the Prosecutor to the Court and the parties in relation to the confirmation hearings in cases ICC-01/09-01/11 and ICC-01/09-02/11, as listed below, and [t]he unredacted transcripts of proceedings during the confirmation hearing of case IC-01/09-01/11".

²⁶ ICC-02/05-03/09-170, para. 14.

²⁷ ICC-02/05-03/09-170, para. 15

²⁸ ICC-02/05-03/09-170, para. 16.

²⁹ ICC-01/09-79, para. 21.

21. Moreover, in terms of both specificity and relevance, the Applicant has not provided a concise statement of the essential facts underlying the request for such documents other than the general statement that it is also investigating post-election violence crimes. Specifically, the Applicant does not provide (i) a description of the persons or groups or persons that are under investigation, (ii) the specific incidents or events, i.e. details of the places of the alleged commission of the crimes and time or time period alleged, or (iii) a statement of facts as to the particular conduct that forms the subject of investigation. Except for references to the six suspects currently before the Court, the Request refers in general terms to investigations currently being conducted in respect of “thousands of other suspects in Kenya”.³⁰ In these circumstances, the Applicant has failed to provide the required information to enable the Court to establish the specificity or relevance of the request in view of the actual material requested.
22. With respect to necessity, the Applicant submits that its request is necessary because the Government of Kenya has no other means of gaining access to such evidence. It states that “[m]uch of this material is unavailable to the Government of Kenya through any other means”, and that the granting of its request is a necessary step “to assist the Kenyan authorities in their national investigations and prosecutions of all those suspected of involvement in the Post-Election Violence”.³¹
23. The Applicant does not explain what steps, if any, it has undertaken to explore whether such information or information of similar value is available from other sources. In particular, the Prosecution notes the considerable law enforcement resources available to the Government of Kenya, its singular capacity – not shared by

³⁰ ICC-01/09-79, para. 3. In relation to the persons and conduct identified in Annex 1, the Applicant does not establish the relevance of the information requested with respect to those investigations or prosecutions.

³¹ ICC-01/09-79, para. 3

the Prosecution -- to investigate within its own borders, and the number of detailed reports containing allegations of crimes related to the post-election violence which have been published by both Kenyan and international institutions.³² In the circumstances, there is considerable doubt as to whether the Prosecution can be said to have unique access to information that is necessary for the investigation of “thousands of other suspects in Kenya” or that the granting of such assistance by the Court is necessary to assist the Kenyan authorities in properly investigating post-election violence crimes.

24. Finally, the Prosecution disagrees that the Court is obligated to assist the Government of Kenya in order to promote complementarity and the State’s effort to establish that the ICC prosecutions are inadmissible.³³ This Chamber has previously held that “the request for assistance has no linkage with the issue of admissibility”;³⁴ “a determination on the inadmissibility of a case pursuant to article 17 of the Statute does not depend on granting or denying a request for assistance under article 93(10) of the Statute”;³⁵ “a State may exercise its national jurisdiction by way of investigating or prosecuting, irrespective of and independent from any investigative activities of the Prosecutor”; “[t]hese domestic proceedings should be in principle carried out without the assistance of the Court”³⁶; and “national investigative activities are conducted independently from this Court and based on the national laws of the Republic of Kenya”.³⁷

³² See, *inter alia*, the annexes to the Prosecutor’s article 15 Application, ICC-01/09-3.

³³ ICC-01/09-79, paras. 3 and 19.

³⁴ ICC-01/09-02/11-96, para. 30.

³⁵ ICC-01/09-02/11-96, para. 30.

³⁶ ICC-01/09-02/11-96, para. 30.

³⁷ ICC-01/09-02/11-340, para. 12.

Relief

25. For the foregoing reasons, the Prosecution respectfully requests the Pre-Trial Chamber to deny the Applicant's Request.



Luis Moreno-Ocampo
Prosecutor

Dated this 6th day of October 2011
At The Hague, The Netherlands