

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09

Date: 12 July 2012

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

**URGENT
Public**

**Decision on the Second 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

Fatou Bensouda, 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

Geoffrey Nice

Rodney Dixon

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Silvana Arbia, Registrar

Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section Other**

PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court”) renders this decision¹ on the “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194” (the “Second Cooperation Request” or the “Request”).²

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.³

2. On 21 April 2011, the Government of the Republic of Kenya (the “GoK”) filed into the record of the situation a cooperation request (the “First 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”.⁴

3. On 29 June 2011, the Chamber issued 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”, in which it rejected the First Cooperation Request.⁵

¹ The present decision is classified as public although it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential *ex parte*, Prosecutor and/or Victims and Witnesses Unit. The Chamber considers that the references made in the present decision are required by the principle of publicity and judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to and have been kept to a minimum.

² “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194”, ICC-01/09-79 and its annexes.

³ 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.

⁴ “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, paras 1-2.

⁵ Pre-Trial Chamber II, ICC-01/09-63.

4. On 16 September 2011, the GoK filed the Second Cooperation Request, in which it also sought the receipt of “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”. In particular, the GoK’s requests receipt of:

All confidential unredacted materials which have been provided by the Prosecutor to the Court and the parties in relation to the confirmation hearings in [the two cases as specified in paragraph 21 of the Request], and [t]he unredacted transcripts of proceedings during the confirmation hearing of case ICC-01/09-01/11 (sic) [as also referred to in paragraph 21 of the Request].⁶

5. On 6 October 2011, the Prosecutor filed his response to the Second Cooperation Request (the “Prosecutor’s Response”),⁷ requesting the Chamber to “deny the Applicant’s Request”.⁸

6. On 18 October 2011, the GoK requested leave to reply to the Prosecutor’s Response (“Request for Leave to Reply”).⁹ The GoK also requested to be granted an extension of time until 31 October 2011 to file its reply.¹⁰

7. On 23 January 2012, the Chamber issued the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” in the two cases, in which, *inter alia*, it confirmed the charges against four out of six suspects to the extent specified in each decision.¹¹

8. On 15 June 2012, the Chamber ordered the Prosecutor to file an update “on her position concerning the provision of confidential documents to the GoK in light of

⁶ ICC-01/09-79, paras 2, 21.

⁷ “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’”, ICC-01/09-80.

⁸ ICC-01/09-80, para. 25.

⁹ “Application on behalf of the Government of Kenya for Leave to Reply to the ‘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’”, ICC-01/09-81.

¹⁰ ICC-01/09-81, para. 25.

¹¹ Pre-Trial Chamber II, ICC-01/09-01/11-373; ICC-01/09-02/11-382-Red.

the present security situation”, no later than Monday 2 July 2012, at 1600 hrs.¹² The Chamber also ordered the Victims and Witnesses Unit (the “VWU”) “to submit [...] a security assessment report” on the same matter, no later than Monday 2 July 2012, at 1600 hrs.¹³

9. On 2 July 2012, the Chamber received said update from the Prosecutor (the “Prosecutor’s Update”)¹⁴ as well as a security assessment report from the VWU (the “VWU Security Report”),¹⁵ in which they both raise concerns regarding the disclosure of confidential information, due to the security situation as elaborated in their submissions.

II. APPLICABLE LAW

10. The Chamber notes articles 21(1)(a) and (3), 68, 93(10)(a),(b)(i)(a), and (ii) and 96 of the Rome Statute (the “Statute”), rule 194 of the Rules of Procedure and Evidence (the “Rules), regulations 24(5) and 34(c) of the Regulations of the Court (the “Regulations”).

III. DETERMINATIONS BY THE CHAMBER

Preliminary Matter Concerning the Request for Leave to Reply

11. The Chamber considers it appropriate to resolve any preliminary matter arising in the context of the present decision before addressing the merits of the Second Cooperation Request.

12. As previously stated in paragraph 5 of this decision, the GoK made two cumulative requests: first, to be granted leave to reply to the Prosecutor’s Response;

¹² Pre-Trial Chamber II, “Order for an Update on the Security Situation in the Republic of Kenya”, ICC-01/09-91-Conf-Exp, p. 5.

¹³ Pre-Trial Chamber II, “Order for an Update on the Security Situation in the Republic of Kenya”, ICC-01/09-91-Conf-Exp, p. 5.

¹⁴ “Prosecution’s Submission regarding the provision of Confidential Information to the Government of Kenya”, ICC-01/09-95-Conf-Exp and its annexes.

¹⁵ “Victims and Witnesses Unit’s Updated report pursuant to the Order [number] ICC-01/09-91-Conf-Exp of 15 June 2012”, ICC-01/09-94-Conf-Exp and its annex.

and second, to file its reply if authorized by the Chamber, after the time limit of ten days set out in regulation 34(c) of the Regulations.

13. In this context, the Chamber recalls regulation 24(5) of the Regulations according to which “[p]articipants *may only reply* to a response with the leave of the Chamber, [...]”. Moreover, regulation 29(1) of the Regulations stipulates that “[i]n the event of non-compliance by a participant with the provisions of any regulation, [...], the Chamber may issue any order that is deemed necessary in the interests of justice”. According to the second paragraph, “[t]his provision is without prejudice to the inherent powers of the Chamber”. The reference to “inherent powers” suggests that the Chamber is also entitled to take any measure which it deems appropriate in the event of non-compliance “with the provisions of any regulation”.

14. In this regard, the Chamber notes that in its Request for Leave to Reply the GoK failed to abide by the essence of regulation 24(5) of the Regulations which makes clear that a participant is not entitled to reply or delve into the merits of its request without being authorised to do so by the relevant Chamber. In this regard the Chamber wishes to emphasize that throughout its Request for Leave to Reply, the GoK *actually* replied to the Prosecution’s Response in a number of paragraphs of its filing (see paras 6, 8, 11, 12, 14, 16, 20, 21 and 22), thus disregarding the clear requirement of regulation 24(5) of the Regulations. In light of the GoK’s non-compliance with said regulation, the Chamber considers that the appropriate remedy is to reject the GoK’s Request for Leave to Reply.

Merits

15. Turning to the merits of the of the Second Cooperation Request, the Chamber recalls article 93(10)(a) and (b) 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. The questioning of any person detained by order of the Court;
- (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.

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

17. A literal reading of article 93(10) of the Statute makes clear that the Court is under no obligation to automatically grant a cooperation request submitted by a State. This is evident from the usage of the verb “may” in article 93(10)(a) of the Statute. Nevertheless, this interpretation should not, in any way, be construed as if the Chamber will likewise automatically reject requests submitted by States. Rather, it implies that the Chamber shall rule on such requests after having properly scrutinised them together with any relevant material in support according to the conditions set out in articles 93(10) and 96 of the Statute together with rule 194 of the Rules. More specifically, a key requisite for the release or transmission of any documents within the Court’s possession is to ensure that such an act would not, *inter alia*, put at risk the safety and physical well-being of victims and witnesses.

18. This requirement is apparent from the text of article 93(10)(b)(ii)(b) of the Statute in conjunction with rule 194(3) of the Rules, according to which the transmission of documents of the nature specified by the GoK “shall be subject to the provisions of article 68”.

19. Turning to the Second Cooperation Request, the Chamber notes that the GoK requested the transmission of several types of documents outlined in 18 bullet points. After a careful review of these points, the Chamber identified that the GoK is seeking permission to receive: 8 items concerning public annexes (ICC-01/09-01/11-149-Anx A; ICC-01/09-01/11-207-Anx A; ICC-01/09-01/11-207-Anx B; ICC-01/09-01/11-238-Anx A; ICC-01/09-01/11-242-Anx A; ICC-01/09-01/11-261-Anx A; ICC-01/09-02/11-100-Anxs A-D and G; ICC-01/09-02/11-135-Anxs A-C; ICC-01/09-02/11-204-Anx A; ICC-01/09-02/11-204-Anx B); 2 items related to public filings (ICC-01/09-02/11-280; ICC-01/09-02/11-293); and the remaining requested materials are confidential annexes as well as copies of unredacted transcripts of the confirmation of charges hearing in the case of the *Prosecutor v. William Ruto et al.* (1-3 and 5-8 September 2011).

20. As to the first set of documents, the Chamber reminds that for documents of a public nature, the law does not require prior judicial authorisation from the Court to receive them, as they are accessible in the public domain. It follows that the GoK does not need to seek the authorization of the Chamber in regard of said documents.

21. With respect to the remaining confidential items requested, the Chamber takes note of the recent Prosecutor’s Update and the VWU Security Report. According to these submissions, there remain security concerns with regard to the disclosure of confidential information relating to witnesses at this stage. In particular, both the Prosecutor and the VWU have reported a number of incidents according to which witnesses had either been subject to threats or actually suffered certain harm. Moreover, there are other reported incidents whereby confidential information

related to the Office of the Prosecutor's witnesses has been leaked. Finally, there remain other reasons preventing the Chamber from granting the GoK Request related to the protection of victims and witnesses which cannot be disclosed in the present decision as they could put at risk those victims and witnesses. Given that the Chamber is duty bound by law to protect the safety and physical well-being of victims and witnesses, it cannot but reject the GoK's Second Cooperation Request at this stage. Consequently, the Chamber does not find it necessary to address the remaining requirements of article 93(10) of the Statute and rule 194 of the Rules.

FOR THESE REASONS, THE CHAMBER, HEREBY

- a) rejects** the Request for Leave to Reply;
- b) rejects** the Second Cooperation Request;
- c) orders** the VWU to provide the Prosecutor with a public redacted version of document ICC-01/09-94-Conf-Exp-Anx;
- d) 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.



Judge Ekaterina Trendafilova
Presiding Judge



Judge Hans-Peter Kaul
Judge



Judge Cuno Tarfusser
Judge

Dated this Thursday, 12 July 2012

At The Hague, The Netherlands