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International
Criminal
Court

Original: **English**

No.**: ICC-01/09-02/11**
Date: **28/09/2012**

TRIAL CHAMBER V

Before: **Judge Kuniko Ozaki, Presiding Judge**
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA
AND
UHURU MUIGAI KENYATTA

Public Document
with Confidential Annex A, *ex parte*, Applicant and Prosecution only &
Public Annex B

Application for a ruling on the legality of the arrest of Mr. Dennis Ole Itumbi

Source: **Dennis Ole Itumbi, represented by Nicholas Kaufman**

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

The Office of the Prosecutor
Ms. Fatou Bensouda, Prosecutor
Ms. Cynthia Tai, Trial Lawyer
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Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

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REGISTRY

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Defence Support Section

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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. On 21 September 2012, Dennis Ole Itumbi ("the Applicant") requested that Pre-Trial Chamber II[1] rule on the legality of his arrest in the context of an investigation instigated, to the best of his knowledge, by the Office of the Prosecutor ("OTP") and, conducted in connection with current International Criminal Court ("ICC") proceedings.[2]

2. On 25 September 2012, Pre-Trial Chamber II urgently ruled that it was not procedurally competent to deal with the application stating as follows:

> "*In this context, the Chamber wishes to underline that by virtue of the Presidency's Decisions, Trial Chamber V has been constituted, and accordingly, it is responsible for the conduct of "subsequent proceedings" related to the two cases, subject to the application of articles 61(9) and 64(4) of the Statute. Given that the Application presented and the annex appended thereto raise an issue concerning the alleged intimidation of the Prosecutor's witnesses in the two cases already before the Trial Chamber, the Chamber considers that it is no more competent to address the Application sub judice..,*".[3]

3. The Applicant wishes to stress that his original application was filed before Pre-Trial Chamber II because the OTP had refused to confirm or deny whether it is conducting an investigation against him and with respect to what specific factual allegations.[4] All that the Applicant knows is what the Kenyan authorities have informed him; namely, that he was being investigated pursuant to a complaint originating from the ICC.

4. For reasons which will be clarified in paragraphs 5, 6 and 7 below, the Applicant very respectfully dissents from Pre-Trial Chamber II's ruling as to its lack of procedural competence yet, in the pursuit of his rights and lest he be denied a remedy for a plainly justiciable issue, accepts the import thereof; namely, that the appropriate legal forum for his claim ought to be Trial Chamber V.

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[1] Responsible for all pre-trial matters in the Kenya Situation.
[2] ICC-01/09-105.
[3] ICC-01/09-106.
[4] Letter from OTP to Counsel for the Applicant dated 13 September 2012.

5. Rule 163(1) of the Rules of Procedure and Evidence quite plainly states that the Statute (including Part V thereof with the exception of articles 53 and 59) and the Rules "*shall apply mutatis mutandis to the Court's investigation … of offences defined in article 70*". Part V of the Rome Statute thus empowers the Pre-Trial Chamber to oversee the investigation of offences committed under article 70 of the Rome Statute in the first instance and not the Trial Chamber. Moreover, should the OTP, at any stage, formally charge the Applicant with offences under article 70 of the Rome Statute, there will be a consequent need for a confirmation hearing and, once again, it will be Pre-Trial Chamber II which will be seized of the matter and not Trial Chamber V. [5]

6. The Applicant vehemently denies "intimidating" Prosecution witnesses in either of the two cases being conducted before Trial Chamber V. Contrary to Pre-Trial Chamber II's ruling, the Applicant asserts that the Kenyan authorities never cautioned him or investigated him for "intimidating" witnesses. All that the Applicant was told, as he indeed clarified in his original application, was that he had allegedly "contacted" or "disturbed" ICC witnesses and had "hacked" his way into their email accounts or the "ICC website" – something which he also strenuously denies. Indeed, had the Applicant been suspected of "intimidating" witnesses,[6] he would presumably have been cautioned under the Kenyan International Crimes Act (2008)[7] and not merely under the Kenyan Communications Amendment Act (2008).[8]

7. In any event, the Applicant was, at no stage, informed as to which "ICC witnesses" he was alleged to have contacted – whether those interviewed by the OTP

[5] Rule 165(3) of the Rules of Procedure and Evidence.
[6] "*intimidation*" implies the making of threats or menacing behaviour as distinct from mere contacting or disturbing.
[7] c.f.; article 16 of the Kenyan International Crimes Act (2008) which specifically proscribes the "intimidation" of ICC witnesses: "*Every person who, wrongfully and without lawful authority—*
(a) for the purpose of compelling another person to abstain from doing anything that the person has a lawful right to do; or (b) to do anything that the person has a lawful right to abstain from doing, in relation to any proceedings of the ICC, causes the person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to the person is guilty of an offence and liable on conviction to imprisonment for a term of not more than five years."
[8] The Kenyan Communications Amendment Act (2008) sanctions various activities calculated to obtain illegal access to electronic media but is not specific to the International Criminal Court.

in connection with ICC-1/09-01/11 or those interviewed in connection with ICC-01/09-02/11 ("the Kenyan Cases"). The paucity of information available to the Applicant in this respect makes it more appropriate for him to pursue his claim before the Pre-Trial Chamber dealing with the Kenya Situation and not the Trial Chamber.

8. Pre-Trial Chamber II's decision of 25 September 2012 cannot be appealed. The Applicant has been denied knowledge of any live ICC proceedings to which he is a party. Resolving the competence of Pre-Trial Chamber II is not, therefore, a matter which would be certified for appeal under article 82(1)(d) of the Rome Statute; it would not affect the "*conduct of*" any related ICC proceedings and an immediate resolution of the matter by the Appeals Chamber, similarly, would not "*materially advance*" any concurrent legal process.

9. In light of all the aforementioned, the present application is re-filed before this learned Trial Chamber not because the Applicant claims any particular knowledge of which ICC witnesses may have been "intimidated" (if at all), but because Pre-Trial Chamber II's decision of 25 September 2012 has obligated him to do so. Similarly, the Applicant re-files his application in the context of case ICC-01/09-02/11 not because of any personal and intimate knowledge of the witnesses in that case but because media articles have linked the investigation of witness tampering to that case more than to ICC-01/09-01/11[9] and because Pre-Trial Chamber II has deemed the salient issues arising out of the Applicant's petition to be relevant to both of the Kenyan Cases.

10. Should Trial Chamber V decide, however, that it lacks procedural competence to deal with the Applicant's petition, it will be requested to remit the matter to "*another available judge of the Pre-Trial Division*" pursuant to article 64(4) of the Rome Statute.

[9] http://allafrica.com/stories/201204140164.html (last accessed 28.9.12).

11. As a preliminary step, therefore, to requesting compensation under article 85(1) of the Statute, the Applicant hereby petitions Trial Chamber V to rule on the legality of his arrest in the context of an investigation instigated by the OTP or, alternatively, in the context of an investigation connected to ICC proceedings in general.

Relevant Factual Background

12. On 1 September 2011, the confirmation hearings in Kenya case ICC-01/09-01/11 commenced followed, three weeks thereafter, by the confirmation hearings in Kenya case ICC-01/09-02/11.

13. On 17 October 2011, the website "*Institue for War and Peace Reporting*" published the following comments:

> *"Prosecutor Luis Moreno Ocampo says the court is conducting investigations on social media users who are interfering with the justice process, "Those involved in attacking.. witnesses….we will find them. We are working on these blog people, and we will get them," Ocampo told IWPR. "We can prosecute them. I would like to warn them if they are involved in tampering [with] witnesses they could be [held] accountable before the ICC."*[10]

14. On 16 March 2012, the Kenyan digital news website "*Standard*" reported as follows:

> *"Louis Moreno-Ocampo has focused his lenses on the Kenyan case writing a letter to Attorney General over intimidation of witnesses. In the complaint to the AG, ICC raised concern over the hacking of email accounts of a person of interest to the Office of the Prosecutor*".

In the same article, the Kenyan Attorney General – Mr. Githu Muigai ("the Kenyan Attorney General") was reported to have stated as follows:

> "*The Office of the Prosecutor of the ICC has drawn [the] attention [of] the AG of Kenya to the following complaints: hacking of email accounts of a person of interest to the Office of The Prosecutor, intimidation of Office of The Prosecutor witnesses*".[11]

[10] http://iwpr.net/report-news/icc-cases-threatened-social-media-leaks (last accessed 20.9.12).
[11] http://www.standardmedia.co.ke/?articleID=2000054159&pageNo=1 (last accessed on 20.9.12).

15. On 22 March 2012, at 19:20 or thereabouts, the Applicant was stopped by at least a dozen gun-toting law enforcement officers while traveling in the Gunthuri district of Embu, Kenya. After being bundled into the back seat of a police car, the Applicant was driven to the headquarters of the Central Investigation Department of the Kenyan police force ("the Kenyan CID") in Nairobi. At no stage was the Applicant informed of the statutory basis for his arrest and, instead of being read his rights, was subjected to a barrage of questions such as why he was "disturbing" ICC witnesses and whether the laptop which had been seized from him was used for "hacking".

16. On 23 March 2012, after spending the night in police detention, without any access to a lawyer, the Applicant was interviewed by three detectives of the Kenyan CID. The Applicant recalls that he was interrogated on the following issues:

(i) Whether he knew any ICC Witnesses;

(ii) Whether he was familiar with "RV Pundit" (the username of an individual frequenting www.nipate.com - a Kenyan internet forum devoted to contemporaneous politics including developments in the Kenya Situation at the ICC);

(iii) Whether he was familiar with "True RV" (another username on www.nipate.com);

(iv) Whether he had hacked the email accounts of ICC witnesses;

(v) Whether he was familiar with the owners of www.nipate.com;

(vi) Whether he had been in contact with any ICC witness;

(vii) Whether he had accessed the ICC website;

(viii) Whether he had in his possession material from the ICC;

(ix) How he would hack a website, and;

(x) How many ICC witness statements he had in his possession.

17. On 26 March 2012, the Applicant was released from police custody without having once been brought before a judge for review of the legality or the conditions of his detention.[12] At no stage was the Applicant presented with a judicial warrant authorizing his arrest or the subsequent search and seizure executed on his domestic premises. Only at the conclusion of his interrogation, and shortly before his release, was the Applicant presented with a document which recorded that he had been arrested on suspicion of having obtained illegal access to confidential information in contravention of the Kenyan Communications Amendment Act (2008).[13]

18. On 29 March 2012, so the Applicant has been led to believe, the Information Technology Department of the ICC had concluded that its internet/email systems had <u>not</u> been compromised by any external entity <u>including</u> the Applicant. Should this indeed be the case, then a substantial portion of the allegations leveled at the Applicant would appear to be unfounded.

19. On 10 April 2012, the Applicant was summoned to the Departmental Committee on Defence and Foreign Affairs of the Kenyan Parliament as a result of allegations "*in the public domain*" linking him "*to hacking ICC emails*".[14]

20. Subsequent to his release, the Applicant was informed by the Kenyan CID as follows:

[12] The Applicant should have been brought before a domestic court on 23 April 2012: Article 36 of the Kenyan Criminal Procedure Code [2009] stipulates as follows: "*When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence and attempted robbery with violence, the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable: Provided that an officer in charge of a police station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge.*"

[13] It is interesting to note that the Applicant was not informed that he was suspected of having committed offences contrary to the Kenyan International Crimes Act (2008).

[14] **Confidential Annex A**: filed confidentially, *ex parte*, Applicant and Prosecution only on account of the personal contact details contained therein. If it is indeed true that no hacking of ICC systems had taken place, then the Kenyan parliament was not apparently made aware of such at that moment in time.

(1) that dealings with the investigation against him had stalled pending the receipt of a formal complaint from the ICC – presumably a statement to be taken from a representative of the OTP, and;

(2) that the OTP had requested that the Kenyan CID forward it copies of the Applicant's interview and the results of the forensic examination of the Applicant's electronic media.

21. On 6 September 2012, the Appeals Chamber of the ICC issued the public-redacted version of its "*Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga*" in which it noted that the OTP did not object to making public its confidential investigation being conducted against the same David Nyekorach-Matsanga ("Matsanga").[15]

22. On 12 September 2012, and in light of the aforementioned decision of the Appeals Chamber, herein undersigned counsel ("Counsel") wrote to the current Prosecutor of the International Criminal Court and asked to know whether the OTP had initiated a similar investigation against the Applicant for crimes allegedly committed under article 70 of the Rome Statute.

23. On 13 September 2012, the OTP replied to Counsel stating that it was under no obligation to inform him as to "*the status of any alleged investigation it may or may not be undertaking*".

24. On 19 September 2012, Counsel wrote to the Kenyan Attorney General requesting that he close the police file concerning the Applicant on the grounds that there was no case to answer. Furthermore, Counsel requested that the Kenyan Attorney General forward copies of all correspondence received by the Kenyan authorities from the OTP which prompted the arrest and subsequent interrogation of the Applicant.

[15] ICC-01/09-96-Red at para. 9.

Relevant Law

25. Article 70 of the Rome Statute which reads as follows:

Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

26. Rule 162 of the Rules of Procedure and Evidence:

Offences against the administration of justice under article 70
Exercise of jurisdiction

1. Before deciding whether to exercise jurisdiction, the Court may consult with States Parties that may have jurisdiction over the offence.

2. In making a decision whether or not to exercise jurisdiction, the Court may consider, in particular:

(a) The availability and effectiveness of prosecution in a State Party;

(b) The seriousness of an offence;

(c) The possible joinder of charges under article 70 with charges under articles 5 to 8;

(d) The need to expedite proceedings;

(e) Links with an ongoing investigation or a trial before the Court; and

(f) Evidentiary considerations.

3. *The Court shall give favourable consideration to a request from the host State for a waiver of the power of the Court to exercise jurisdiction in cases where the host State considers such a waiver to be of particular importance.*

4. *If the Court decides not to exercise its jurisdiction, it may request a State Party to exercise jurisdiction pursuant to article 70, paragraph 4.*

27. Rule 163 of the Rules of Procedure and Evidence:

Application of the Statute and the Rules

1. *Unless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply mutatis mutandis to the Court's investigation, prosecution and punishment of offences defined in article 70.*
2. *The provisions of Part 2, and any rules thereunder, shall not apply, with the exception of article 21.*
3. *The provisions of Part 10, and any rules thereunder, shall not apply, with the exception of articles 103, 107, 109 and 111.*

28. Rule 165 of the Rules of Procedure and Evidence:

Investigation, prosecution and trial

1. *The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.*

2. *Articles 53 and 59, and any rules thereunder, shall not apply.*

29. Rule 167 of the Rules of Procedure and Evidence:

International cooperation and judicial assistance

1. *With regard to offences under article 70, the Court may request a State to provide any form of international cooperation or judicial assistance corresponding to those forms set forth in Part 9. In any such request, the Court shall indicate that the basis for the request is an investigation or prosecution of offences under article 70.*

2. *The conditions for providing international cooperation or judicial assistance to the Court with respect to offences under article 70 shall be those set forth in article 70, paragraph 2.*

30. Article 85(1) of the Rome Statute providing as follows:

Compensation to an arrested or convicted person

1. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation…*

31. Rule 173 of the Rules of Procedure and Evidence which provides as follows:

Request for compensation

1. *Anyone seeking compensation on any of the grounds indicated in article 85 shall submit a request, in writing, to the Presidency, which shall designate a Chamber composed of three judges to consider the request. These judges shall not have participated in any earlier judgement of the Court regarding the person making the request.*

2. *The request for compensation shall be submitted not later than six months from the date the person making the request was notified of the decision of the Court concerning:*
   (a) The unlawfulness of the arrest or detention under article 85, paragraph 1;
   (b) The reversal of the conviction under article 85, paragraph 2;
   (c) The existence of a grave and manifest miscarriage of justice under article 85, paragraph 3.

3. *The request shall contain the grounds and the amount of compensation requested.*

4. *The person requesting compensation shall be entitled to legal assistance.*

Submission

32. Rule 173(2)(a) makes it clear that before the Presidency of the ICC ("the Presidency") can be seized of an application for compensation, there is a need for a prior Court ruling on the legality of an arrest or detention. In cases where detention occurs as a result of an investigation which is subsequently terminated[16] before the presentation of charges, there will invariably be no ICC decision on the legality of an arrest which was executed in the course of the same investigation. A ruling in the present instance is thus essential to give practical effect to the remedy provided for in article 85(1) of the Rome Statute.

33. In considering, therefore, whether the Applicant is entitled to seek a ruling of the Presidency on the issue of compensation, the Trial Chamber, so it is submitted, will need to consider three questions: (i) whether the Applicant was arrested in connection with ICC proceedings; (ii) whether the Applicant's arrest was illegal, and; (iii) whether the illegality of the arrest need be attributed specifically to the OTP?

[16] By the OTP or domestic authorities for lack of evidence or a reasonable chance of obtaining a conviction.

(i) Whether the Applicant was arrested in connection with ICC proceedings?

34. Unless bound by a court order mandating it to maintain confidentiality, the refusal of the OTP to confirm or deny the existence of an investigation against the Applicant has neither rhyme nor reason. The former Prosecutor never hid the fact that he was going to investigate "*blog people*" and the OTP has recently, by default, acknowledged the existence of just such an investigation against Matsanga. Additionally, both the Kenyan Attorney General and the CID detectives acknowledged that they were acting on a complaint received from the ICC.

35. In any event, the filing of this application will oblige the OTP to respond within 21 days whereupon, it will either challenge the standing of the Applicant to petition the Trial Chamber or deal with the substance of his petition. There can be no doubt that if an investigation is, indeed, being conducted against the Applicant then he has standing to petition the Court.[17] Accordingly, should the OTP adopt the former route and request that the application be dismissed *in limine*, it will effectively be acknowledging that it has never instigated an investigation against the Applicant with a view to prosecuting him for offences under article 70 of the Rome Statute.

36. If, however, it is true that the OTP has, indeed, requested the transcripts of the Applicant's interview and the results of the forensic analysis of his electronic media, then, logically, it can only be for one of two reasons: either for the purpose of an ongoing investigation of the Applicant himself or for bolstering the acknowledged investigation of Matsanga. The Applicant submits that the distinction is irrelevant for the purpose of article 85(1) which fixes an enforceable right to compensation for "<u>anyone</u>" who has been the victim of unlawful arrest – regardless of whether he be deemed a suspect or a potential witness. The only necessary requirement is that the

[17] ICC-01/09-96-Red at para. 17, by way of comparison, where it was acknowledged by the Appeals Chamber that Matsanga had standing to request the disqualification of the Prosecutor pursuant to article 42(8)(a) of the Rome Statute.

unlawful arrest or detention be, in some way, causally linked to investigative proceedings being conducted at the International Criminal Court.

(ii) Whether the Applicant's arrest was illegal?

37. The facts set out above, which are supported by affidavit,[18] make it clear that the Applicant was denied due process under international law. He was held for four days in flagrant contravention of article 9 of the International Covenant on Civil and Political Rights[19] which, *inter alia*, enshrines the basic right of any arrestee to know the grounds for the deprivation of his liberty and to challenge them before a judge without delay.[20]

38. The Applicant was arrested and the search and seizure performed on his premises without him being shown any warrant issued by the Kenyan judiciary. Indeed, given the lack of clarity surrounding the statutory basis for his arrest, it is not clear to the Applicant whether he was even suspected of having committed a "cognizable" offence as defined under Kenyan criminal procedure such that his arrest could be effected by a police officer without a judicial warrant. Moreover, at no stage was the Applicant shown any decision of the ICC authorizing the search of his premises or his interrogation pursuant to the State Cooperation procedure set out in Part IX of the Rome Statute.

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[18] **Annex B**.
[19] Ratified by the Republic of Kenya on 1 May 1972.
[20] 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

39. Although the Prosecutor is entitled to instigate an investigation under article 70 on his own initiative, the Applicant submits that the correct procedure for obtaining State cooperation is via the procedure set out in article 54(2) of the Rome Statute and rule 167 of the Rules of Procedure and Evidence which obligates the involvement of the Court. Indeed, the Court's power to request cooperation (such as the interrogation of a witness or suspect or the collection of documentary evidence) is discretionary which implies that the Court may refuse to exercise such a power if it feels that it is not justified in the circumstances. In the present instance, the OTP "short-circuited" conventional procedure, directly and informally petitioning Kenya while side-stepping the requirement that the Court review the necessity of the cooperation sought.

40. It should be stressed that even if the former Prosecutor was of the view that the Applicant's conduct fell foul of article 70 of the Rome Statute, yet felt that the investigation and subsequent prosecution was a matter best handled by the Kenyan authorities, he was not entitled of his own accord to absolve himself of the matter by way of written communication to the Kenyan Attorney General. The Applicant submits that the correct procedure for deferring an investigation under article 70 to a national authority is set out in rule 162(4) of the Rules of Procedure and Evidence. Once again, the deferral of an initiated investigation (as with a request for state cooperation) is subject to Court approval. By directly deferring an investigation of the Applicant for interfering with ICC witnesses to the Kenyan authorities, the OTP was acting *ultra vires*.

41. The Applicant recalls that he was informed, *ex post facto*, that he had been cautioned ("booked") for offences committed under the Kenyan Communications Amendment Act (2008) – presumably on account of the allegation that he had obtained illegal cyber-access to confidential information. The fact that he was not told that he was being investigated for offences committed against the Kenyan

International Crimes Act (2008),[21] which was specifically enacted to give effect to article 70(4) of the Rome Statute, is of extreme relevance. Articles 77(1) and 84(1) of the Kenyan statute make it clear that the domestic investigation of suspected offences against the administration of justice at the ICC is contingent upon receipt of a Court order (and not an informal OTP request) for state cooperation under article 93 of the Rome Statute.[22] The most likely explanation for the decision of the Kenyan authorities not to interview the Applicant pursuant to the International Crimes Act is that this domestic statute, purposefully or otherwise, fails to incorporate the full gamut of criminal behaviour envisaged under article 70 of the Rome Statute. Notably, the alleged conduct concerning which the Applicant was interviewed by the Kenyan CID; namely, "disturbing" and "contacting" ICC witnesses or "hacking their email accounts" is not sanctioned under domestic legislation whereas it may, arguably, constitute "*tampering with or interfering with the collection of evidence*" as defined under article 70(1)(c) of the Rome Statute. Notwithstanding, the Applicant submits that the <u>substance</u> of the OTP's complaint is the determining factor and the fact that the domestic investigation was conducted under the Kenya Communications Amendment Act (2008) does not break the causal nexus with proceedings in The Hague.

(iii) Whether the illegality need be attributed specifically to the OTP?

42. The Applicant submits that there is no need to make a specific finding that the illegality of the arrest is attributable to the OTP as distinct from an unauthorised folly of the Kenyan authorities. Article 85(1) creates an enforceable and mandatory right to compensation for unlawful arrest without stipulating whether the identity of the offending party need be an organ of the Court itself or a national authority. In this respect, article 85(1) differs from articles 85(2) and 85(3) which create conditional and discretionary powers respectively to award compensation where there has been a miscarriage of justice in the course of ICC proceedings.

[21] http://www.kenyalaw.org/kenyalaw/klr_app/frames.php
[22] See also article 21 of the International Crimes Act which sets out the appropriate channels for requesting the assistance of the Kenyan authorities,

43. Moreover, in the chapter on article 85 compensation to be found in Triffterer's "*Commentary on the Rome Statute of the International Criminal Court*", Chris Staker notes that the Rome Statute and its associated rules mandate State Parties to arrest suspects in accordance with national laws. The ICC does not have a police force of its own and is reliant on the cooperation of national authorities to execute an arrest. In these circumstances, to require a successful action for compensation to be contingent on proving misconduct attributable to a Court organ would deprive article 85(1) of any true practical effect.

44. For the sake of completeness, and as a faithful servant of the Court, Counsel for the Applicant feels it necessary to cite a further passage from Staker's commentary on article 85(1):

> "*The first paragraph of this article is ambiguous, in that it does not specify whether it is the limited to unlawful conduct by Court officials, or whether it also extends to unlawful arrests and detentions by State authorities and other persons in connection with proceedings before the Court. In the event that it extends to the latter, a further issue is whether the lawfulness of an arrest or detention by State authorities is a matter that can be determined by the Court, or whether the paragraph 1 merely imposes an obligation on States Parties to establish their own machinery for compensating victims of unlawful arrests and detention by their authorities in connection with ICC proceedings. If the former is the correct interpretation, presumably any compensation awarded by the Court in respect of unlawful conduct of State officials would be paid by the State concerned, rather than by the Court. Rules 173-175 shed no further light on these questions*".

45. Dealing with the query raised by Staker, there can be no doubt that the Applicant's arrest was effected "*in connection with ICC proceedings*". Since the Kenyan legislature has not apparently enacted a domestic mechanism for assessing compensation due under article 85(1) of the Rome Statute, it falls to this learned Trial Chamber to rectify what would otherwise be a situation where the Applicant would be left without legal remedy.

46. Notwithstanding the aforementioned, the illegality of the Kenyan authorities' arrest of the Applicant was provoked and, thereafter, compounded by the *ultra vires* fashion in which the OTP sought the cooperation of the Kenyan authorities. Consequently, accountability for the illegality of the arrest should, in any event, be shared by the OTP.

Relief Sought

47. In light of all the aforementioned, the learned Trial Chamber is requested to rule that the Applicant was illegally arrested in the context of an investigation instigated by the OTP or, otherwise, in connection with ICC proceedings in general.

48. Should the learned Trial Chamber, however, decide that it lacks procedural competence to deal with the Applicant's petition, it will be requested to remit the matter to "*another available judge of the Pre-Trial Division*" pursuant to article 64(4) of the Rome Statute.

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Friday, September 28, 2012