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Date: **16 September 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**

**Request for Assistance on behalf of the Government of the Republic of Kenya  
pursuant to Article 93(10), Article 96 and Rule 194**

**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:

**The Office of the Prosecutor**  
Luis Moreno-Ocampo, Prosecutor

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of the Applicant**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**  
Sir Geoffrey Nice QC  
Rodney Dixon

**Amicus Curiae**

## **REGISTRY**

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**Registrar**  
Silvana Arbia, Registrar  
Didier Preira, Deputy Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## **A. Introduction**

1. The Government of the Republic of Kenya as a State Party of the ICC files this Request for Assistance and Cooperation in respect of its national investigations and prosecutions into all allegations of Post-Election Violence in Kenya pursuant to Article 93(10), Article 96 and Rule 194.
2. The Government of Kenya requests 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. This request includes the following materials:
  - All 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
  - The unredacted transcripts of proceedings during the confirmation hearing of case IC-01/09-01/11.
3. The purpose of the Government of Kenya's Request for Assistance and Cooperation is to have access to the information and evidence in the Court's possession so as to assist the Kenyan authorities in their national investigations and prosecutions of all those suspected of involvement in the Post-Election Violence. Much of this material is unavailable to the Government of Kenya through any other means. As confirmed by the attached annexes, the investigations currently being conducted by the Kenyan authorities include the six Suspects presently before the ICC as well as thousands of other suspects in Kenya.
4. In accordance with Article 93(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."<sup>1</sup> This Article further provides that the "assistance provided under subparagraph (a)

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<sup>1</sup> Article 93(10)(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.”<sup>2</sup>

5. In addition, Article 96(2) provides that “The request [including requests to the Court, where applicable] shall, as applicable, contain or be supported by the following: (a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request; (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided; (c) A concise statement of the essential facts underlying the request; (d) The reasons for and details of any procedure or requirement to be followed; (e) Such information as may be required under the law of the requested State in order to execute the request; and (f) Any other information relevant in order for the assistance sought to be provided.”
6. Rule 194 provides that “(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 sub-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.”
7. In the submission of the Government of Kenya the present Request satisfies the requirements of Article 93(10) and all of the other relevant provisions including Article 96 and Rule 194.

#### **B. First Request for Assistance**

8. On 21 April 2011, the Government of Kenya filed its first Request for Assistance.<sup>3</sup>  
On 29 June 2011, the Pre-Trial Chamber rejected the Government of Kenya’s Request

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<sup>2</sup> Article 93(10)(b)(i).

<sup>3</sup> 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, 21 April 2011 (hereinafter “Request for Assistance of 21 April 2011”).

for Assistance by stating 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’”<sup>4</sup> because the Government “lacked any documentary proof that there is or has been an investigation.”<sup>5</sup>

9. The Pre-Trial Chamber ruled that in order to grant a Request for Assistance, the Government of 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’”<sup>6</sup> and must also satisfy the “remaining relevant requirements set out in articles 93(10) and 96 of the Statute, as well as rule 194 of the Rules.”<sup>7</sup>

10. In addition, although the Pre-Trial Chamber decided 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)”,<sup>8</sup> the Chamber held that it “shall rule on the Cooperation Request with respect to the material and evidence in its possession” because “any material submitted by the Prosecutor to [the Chamber] is deemed in its possession” and any “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.”<sup>9</sup>

11. On 4 July 2011, the Government of Kenya applied for Leave to Appeal the Request for Assistance Decision of 29 June 2011.<sup>10</sup> To date the Pre-Trial Chamber has rendered no decision on the Government of Kenya’s Application for Leave to Appeal the Request for Assistance Decision.

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<sup>4</sup> 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, ICC-01/09-63, 29 June 2011, para. 34 (hereinafter “Request for Assistance Decision of 29 June 2011”).

<sup>5</sup> Request for Assistance Decision of 29 June 2011, para. 34.

<sup>6</sup> Request for Assistance Decision of 29 June 2011, para. 33.

<sup>7</sup> Request for Assistance Decision of 29 June 2011, para. 33.

<sup>8</sup> Request for Assistance Decision of 29 June 2011, para. 31.

<sup>9</sup> Request for Assistance Decision of 29 June 2011, para. 32.

<sup>10</sup> 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”, 4 July 2011 (hereinafter “Leave to Appeal the Request for Assistance Decision”).

12. The Appeals Chamber has ruled that it has no jurisdiction to consider an appeal against the Request for Assistance Decision of 29 June 2011 under Article 82(1)(a).<sup>11</sup> However, this decision has no effect on the Government of Kenya's independent Application for Leave to Appeal the Request for Assistance Decision which has been filed before the Pre-Trial Chamber.

13. This second Request for Assistance is filed without prejudice to the Application for Leave to Appeal the Request for Assistance Decision. It is filed to specify materials that have been provided to the Court since the first Request for Assistance and that have been referenced in the confirmation of charges proceedings in cases ICC-01/09-01/11 and ICC-01/09-02/11, which the Government of Kenya seeks to have provided to its authorities to assist in its national investigation. It is also filed to seek these and all other materials as soon as practicable to obviate any unnecessary delays with its national investigation.

### **C. Submissions**

14. The scope of the present Request for Assistance and Cooperation is, as provided for in Article 93(10), for the transmission of all statements, documents, or other types of evidence obtained by 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.

15. The Government of Kenya particularly requests all confidential deredacted materials provided to the Court for the purpose of the confirmation hearings in cases ICC-01/09-01/11 and ICC-01/09-02/11. The Government of Kenya has set out below the filings in these cases of which it is aware in which confidential materials have been provided to the Court. Furthermore, to the extent that any of these materials were referenced in closed sessions at the confirmation hearing of case ICC-01/09-01/11, the Government of Kenya requests access to the unredacted transcripts of the confirmation hearing.

16. The Government of Kenya submits that it has satisfied the requirements for granting its Request for Assistance and Cooperation.

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<sup>11</sup> Decision on the admissibility of the 'Appeal of the Government of Kenya 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', ICC-01/09-78, 10 August 2011, para. 21.

17. First, the Government of Kenya has been and is conducting investigations and prosecutions in respect of conduct which constitutes crimes under the Court's jurisdiction and also serious crimes under the national laws of Kenya:

- As set out in the Report of March 2011 attached at Annex 1, the Government of Kenya is conducting investigations into and prosecutions of suspects for serious crimes under the national law of Kenya arising from the Post-Election Violence including but not limited to murder, gender based violence, arson, robbery and bulgery, incitement, possession of weapons and preparation to commit a felony.
- This Report notes that there are over 3500 pending investigations and includes up-dated details on the gender based violence cases. The Report recommends that all investigations into Post-Election Violence must be fast-tracked and continuously reviewed.
- As is evident from the Report, these cases cover conduct that constitutes serious crimes under the national law of Kenya. In addition, the cases involve the same conduct within the same locations for Post-Election Violence that are the subject of the Situation in the Republic of Kenya before the ICC, and thus could constitute crimes under the Statute of the ICC.
- Annexes 2 and 3 consist of reports on the national investigation into the six Suspects who are presently before the ICC. The Report of 5 May 2011 notes the pending investigation into Mr. Ruto as well as the steps that are being taken to investigate the other Suspects before the ICC. The latest Report of 1 July 2011 provides an update on the Government of Kenya's investigation into the six Suspects before the ICC. It has not been previously submitted to the Pre-Trial Chamber. The Report notes what inquiries are presently being conducted, the witnesses who are being interviewed, the sites being visited, the documentation being reviewed and that the suspects are being interviewed. It also identifies further investigative tasks to be undertaken, about which updated reports will be provided.

- As explained in these Reports the conduct being investigated concerns all allegations of the commission of crimes during the Post-Election Violence, which is the subject of the Situation in the Republic of Kenya before the ICC as well as the charges that are currently being considered by the ICC in respect of the six Suspects.

18. The Court is clearly in possession of information and materials that are relevant to these national investigations into the six Suspects as well as all other suspects who are referred to in the Report at Annex 1. These materials would greatly assist the Government of Kenya to advance and complete its investigations and prosecutions of unlawful conduct during the Post-Election Violence. In particular, the materials include evidence which may not otherwise be available to the Government of Kenya. To the extent that the Court is relying on anonymous witnesses who do not presently reside in Kenya, this is evidence which the Kenyan authorities cannot access without the assistance and cooperation of the Court.

19. Under the principle of complementarity, the Government of Kenya submits that the Court should seek to provide the assistance and cooperation sought by the Government. Article 93(10) specifically makes provision for State Parties to request the Court's assistance and cooperation in the terms set out in the present Request.

20. Much of the material sought by the Government of Kenya has been disclosed to the six Suspects, albeit in redacted form. The Government of Kenya should have access to this material when its authorities are investigating the very same persons.

21. Second, the Government of Kenya has complied with the relevant requirements set out in Article 96 and Rule 194 to the extent that they are applicable. It has set out the purpose, legal basis and grounds for the Request. Furthermore, as listed below, it has specified the filings in which it has come to the Government's notice that confidential materials do exist which should be made available to the Government of Kenya; these include:

- Prosecution's First Communication of Potentially Exculpatory Evidence to the Defence, Public Annex A and Confidential Annex B, ICC-01/09-01/11-149, 28 June 2011;



- Prosecution's Communication to the Defence of Potentially Exculpatory Evidence and material for the preparation of the defence within the meaning of Rule 77, Public Annexes A, B and Confidential Annex C, ICC-01/09-01/11-207, 19 July 2011;
- Prosecution's Communication to the Defence of Potentially Exculpatory Evidence, Confidential Annex A, ICC-01/09-01/11-219, 25 July 2011;
- Prosecution's Communication to the Defence of Potentially Exculpatory Evidence, Confidential Annex A, ICC-01/09-01/11-220, 25 July 2011;
- Prosecution's submission of the confidential redacted version of the Article 58 Application, Confidential Annex A, ICC-01/09-01/11-224, 26 July 2011;
- Prosecution's Communication to the Defence of Incriminating Evidence pursuant to Article 61(3)(b), Confidential Annexes A-F, ICC-01/09-01/11-237, 29 July 2011;
- Prosecution's communication to the Defence of potentially exculpatory evidence and material for the preparation of the Defence within the meaning of Rule 77, Public Annex A and Confidential Annexes B-D, ICC-01/09-01/11-238, 29 July 2011;
- Prosecution's Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3), Public Annex A and Confidential Annex B, ICC-01/09-01/11-242, 1 August 2011;
- Prosecution's Communication to the Defence of Incriminating Evidence pursuant to Article 61(3)(b), Confidential Annex A, ICC-01/09-01/11-245, 3 August 2011;
- Prosecution's communication to the Defence of material for the preparation of the Defence within the meaning of Rule 77, Confidential Annex A, ICC-01/09-01/11-244-Red, 3 August 2011;

- Prosecution's Amended Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rules 121(3), (4) and (5), Public Annex A and Confidential Annex B, ICC-01/09-01/11-261, 15 August 2011;
- Prosecution's First Communication of Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence, Public Annexes A, B, C, D, G and Confidential Annexes E, F, H, ICC-01/09-02/11-100, 3 June 2011;
- Prosecution's First Communication of the Disclosure of Potentially Exculpatory Evidence and Second Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence, Public Annexes A, B, C and Confidential Annexes D, E, ICC-01/09-02/11-135, 24 June 2011;
- Prosecution's submission of the confidential redacted version of the Article 58 Application, Confidential Annex A, ICC-01/09-02/11-197, 26 July 2011;
- Prosecution's Third Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence, Public Annexes A, B and Confidential Annex C, ICC-01/09-02/11-204, 29 July 2011;
- Prosecution's Amended Document Containing the Charges and List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3), (4) and (5), ICC-01/09-02/11-280, 2 September 2011;
- Disclosure of Evidence Pursuant to Rule 121(4) of the Rules of Procedure and Evidence, ICC-01/09-02/11-293, 5 September 2011;
- Unredacted transcripts of 1 September 2011, 2 September 2011, 3 September 2011, 5 September 2011, 6 September 2011, 7 September 2011, 8 September 2011 of the Confirmation Hearings in Case ICC-01/09-01/11.

22. As provided for in Rule 194, to the extent that protected measures have been adopted for any of the evidence requested, such measures can be considered before deciding on the request and necessary protective measures put in place, where justified, or arrangements made with the appropriate Kenyan authorities to ensure that the interests

of victims and witnesses are protected in the national investigations in accordance with Kenya's laws and witness protection programs. As noted in the Admissibility Application of 31 March 2011<sup>12</sup> and the Government Reply of 13 May 2011<sup>13</sup>, an elaborate witness protection and support system has been adopted and is operational in Kenya (with the support of the UN and other countries). Moreover, the ICC Prosecutor has previously relied on Kenyan witness protection programs.<sup>14</sup>

#### **D. Conclusion**

23. Accordingly, the Government of Kenya respectfully requests the Pre-Trial Chamber to grant its Request for Assistance and Cooperation and transmit the materials sought to the Government of Kenya as soon as practicable.




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

Dated 16<sup>th</sup> September 2011  
London, United Kingdom

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<sup>12</sup> Admissibility Application of 31 March 2011, paras. 39, 78.

<sup>13</sup> Government Reply of 13 May 2011, paras. 5, 7, 53, 71-75.

<sup>14</sup> 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, 13 May 2011, paras. 5, 74.