



Original: English

No.: ICC-01/09

Date: 4 July 2011

IN THE APPEALS CHAMBER

Before: Judge Daniel David Ntanda Nsereko, Presiding Judge
Judge Akua Kuenyehia
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF KENYA

Public Document

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”

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**

Paolina Massida

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

States Representatives

Sir Geoffrey Nice QC

Rodney Dixon

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia, Registrar

Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Fiona McKay

Other

A. Introduction

1. The Government of Kenya respectfully submits its appeal against Pre-Trial Chamber II's "Decision for 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" (the "Cooperation Request Decision"), dated 29 June 2011, before the Appeals Chamber pursuant to Article 82(1)(a) of the Statute.
2. The Government of Kenya submits that the Pre-Trial Chamber committed three serious errors: (i) an error of fact in holding that the Cooperation Request "*lacked any documentary proof that there is or has been an investigation*"¹; (ii) an error of procedure by not allowing the Government of Kenya to reply to the Prosecutor's Response to the Government of Kenya's Cooperation Request of 10 May 2011²; and (iii) an error of law in holding that the Chamber could not order the Prosecutor to provide any material or evidence in his possession to a State pursuant to a request under Article 93(10)³. These errors are discussed in Part E below.

B. Relevant legal provisions

3. The Government of Kenya files this appeal pursuant to Article 82(1)(a) and in accordance with Rule 154(1) for the reasons set out in Part C below. The Government of Kenya will file a document in support of its appeal under Regulation 64(2) to elaborate on the grounds of appeal as set out below.
4. Article 82(1)(a) of the Statute allows parties to appeal "A decision with respect to ... admissibility." Such appeals can be based on errors of law, errors of fact and procedural irregularities.⁴

¹ Cooperation Request Decision, para. 34.

² "Prosecution's Response to 'Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194'", ICC-01/09-01/11-83 and ICC-01/09-02/11-86, 10 May 2011, paras. 5-8, 16-27 (hereinafter "Prosecution Response of 10 May 2011").

³ Cooperation Request Decision, paras 30-31.

⁴ The Appeals Chamber has held that appeals under Article 82(1)(a) can be based on errors of laws, errors of fact and procedural errors. See *Prosecutor v. Kony*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05, 16 September 2009, para. 47.; *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08, 19 October 2010, para. 100-101. The Appeals Chamber has held that "for a successful appeal, the error raised by an appellant must have materially affected the impugned decision ... the Appeals Chamber stated that an error materially affected the impugned decision if the decision would have

5. Rule 154(1) states that “An appeal may be filed under ... article 82, paragraph 1 (a) or (b), not later than five days from the date upon which the party filing the appeal is notified of the decision.” Regulation 64(2) provides that “the appellant shall file a document in support of the appeal, with reference to the appeal, within the 21 days of notification of the relevant decision.”

C. The provisions of Article 82(1)(a)

6. The Government of Kenya brings this appeal against the Cooperation Request Decision before the Appeals Chamber on the basis that it is “*a decision with respect to ... admissibility*” as provided for Article 82(1)(a). The Government of Kenya filed its Cooperation Request in light of its Admissibility Application. It sought access to the ICC’s evidence to assist with its national investigation. The Pre-Trial Chamber, however, rejected the Cooperation Request for exactly the same reason it refused the Government’s Admissibility Application - “inactivity” on the part of the Government of Kenya and a lack of information to substantiate that any national investigation is ongoing. The Pre-Trial Chamber’s refusal of the Government’s Cooperation Request prevents the Government of Kenya from gaining information and evidence from the ICC cases that could significantly assist the Government of Kenya in its national investigation of the six persons suspected by the ICC.
7. The Admissibility Application - *properly considered* - is, of course, not at all dependent on receiving the ICC’s evidence. The Application’s strength is to be determined by assessment of what the Government of Kenya is doing, an assessment - the Government of Kenya says - the Pre-Trial Chamber has never *properly* attempted. The danger arising from the Pre-Trial Chamber and the Prosecutor’s failure and refusal to provide evidence in the Court’s possession to the Government of Kenya is that Kenya’s inability to act on such evidence in its own investigation may *seem* to weaken the Admissibility Application in the minds of the Court. On proper analysis, unless it can be shown that the evidence in the Prosecutor’s possession is also in the Government of Kenya’s possession - *or ought to have been* - then it would be quite wrong *and unjust* for the refusal to provide evidence to serve to “weaken” the

been “substantially different.” *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07, 25 September 2009, para. 37.

Application, in perception or at all in any way. In reality the Pre-Trial Chamber has supported a false line of reasoning by the Prosecutor to the general effect: “I have evidence against these six Suspects that I will not provide to the Government of Kenya and as the Government of Kenya does not have this evidence and has not investigated on the basis of such evidence then it cannot try these Suspects in Kenya”.

8. The Government of Kenya repeats that *nowhere* does the Prosecutor say that the evidence in the Prosecutor’s possession is also in the Government of Kenya’s possession - *or ought to have been*. Had the Pre-Trial Chamber focused on this fact, then it would have appreciated that its duty was to attend to all evidence of what the Government of Kenya was doing, this alone being what should determine the Admissibility Application. This is something the Pre-Trial Chamber has simply not done, perhaps because it allowed itself to be misled by the false line of reasoning set out above.
9. A key legal argument raised by the Government in its Admissibility Application, and which is part of its appeal against the Admissibility Decision, also demonstrates the inter-relationship between the Cooperation Request and the admissibility of the ICC cases. The Government of Kenya puts forward the legal argument that the admissibility of a case cannot necessarily always be determined by “the same conduct, same person” test:

“as the State may simply not have evidence available to the Prosecutor of the ICC or may even be deprived of such evidence (as here where the Prosecutor has, to date, not provided evidence he possesses to the Government of Kenya, and has now indicated that he will refuse to do so). Although there may be no doubt that there is *subject matter* requiring investigation - in this case Kenya’s Post-Election Violence - there is simply no guarantee that an identical cohort of individuals will fall for investigation by the State seeking to exclude ICC admissibility as by the ICC Prosecutor seeking to establish it. To find otherwise would mean a Prosecutor could establish grounds for trying individuals against whom he alone held evidence that he declined to provide to the State (as he is doing in the present case), thus denying the State even the chance of establishing complementarity grounds for excluding ICC admissibility. It could be seen as compelling State authorities to surrender independence on the ‘say-so’ of the ICC Prosecutor whose mere identification of possible suspects could embarrass a State to ‘adjust’ its own proper prosecution policy in order to avoid the State humiliation of having authority wrested away to the ICC for those chosen or identified as suspects by the Prosecutor.”⁵

⁵ Reply of 13 May 2011, para. 27.

10. For these reasons, the Government of Kenya respectfully submits that the Appeals Chamber should consider the Government of Kenya's appeal against the Cooperation Request Decision together with the Government of Kenya's appeal against the Admissibility Decision. As the Appeals Chamber will be aware, one of the grounds of the Government's Admissibility Appeal is that the Pre-Trial Chamber erred in not deciding the Government's Cooperation Request before finally determining the Admissibility Application. The Appeals Chamber should not finally decide the Admissibility Appeal, the Government of Kenya will respectfully argue, without determining whether the Government of Kenya is entitled to have access to the ICC's evidence. It is thus both logical and practical for the Appeals Chamber to consider the errors in the Cooperation Request Decision in conjunction with the appeal on the admissibility of the two ICC cases.

D. Procedural History

11. On 31 March 2011, the Government of Kenya filed the "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute" requesting Pre-Trial Chamber II determine the case against the six persons for whom summonses to appear have been issued, is inadmissible ("the Admissibility Application"). The Government of Kenya informed the Court in this Application that there is an ongoing national investigation into the six ICC Suspects and that the Government would provide reports to the Chamber in order to update the Court on the progress of the investigation.⁶

12. On 21 April 2011, the Government of Kenya filed the "Filing of Annexes of Materials to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute," in which the Government of Kenya provided the Chamber with documentary evidence that a national investigation into the Post-Election Violence had been initiated and was progressing.⁷

13. On 21 April 2011, the Government of Kenya also filed the "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and

⁶ Admissibility Application of 31 March 2011, paras. 4, 12, 13, 17, 33, 35, 36, 46, 66, 71, 72, 74, 79.

⁷ Filing of Annexes of 21 April 2011, Annex 1, 2, 3.

Rule 194” (the “Cooperation Request”). In the Cooperation Request, the Government of Kenya requested that “the Court and the Prosecutor provide to the appropriate Kenyan authorities the evidence in the possession of the Court and the Prosecutor to assist the Kenyan authorities in their national investigations and prosecutions” including in respect of the six ICC suspects.⁸

14. On 10 May 2011, the Prosecution filed the “Prosecution’s Response to ‘Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194’” with a corrigendum to this Response received on 12 May 2011. The Response invited the Chamber to reject the Government of Kenya’s Cooperation Request on various grounds including that there was no ongoing investigation.

15. On 13 May 2011, the Government of Kenya submitted its Reply to the Responses of the parties filed of 28 April 2011 to the Government’s Admissibility Application. The Government of Kenya stated in its Reply that the six Suspects were, and are, being investigated by the Kenyan authorities.⁹

16. On 17 May 2011, the Government of Kenya submitted its Application for an oral hearing, in which the Government of Kenya requested the Chamber grant the Government of Kenya and other parties an oral hearing to make submissions to the Court on legal issues and on the evidence of its national investigation in Kenya. The Government of Kenya submitted that at an oral hearing the Kenyan Commissioner of Police in charge of the national investigation could testify so that the Chamber could make any inquiry into the existence of a national investigation.¹⁰

17. On 18 May 2011 the Government of Kenya submitted an application for leave to reply to the Prosecution’s Response of 10 May 2011 in respect of the Government’s Cooperation Request.

18. On 30 May 2011, the Pre-Trial Chamber II issued its Decision to the Government of Kenya’s Admissibility Application of 31 March 2011 in which the Chamber rejected the Government of Kenya’s Admissibility Application, finding the case admissible

⁸ Cooperation Request, para. 3.

⁹ “Reply on behalf of the Government of Kenya to the Responses of the Prosecutor, Defence, and OPCV to the Government’s Application pursuant to Article 19 of the Rome Statute,” ICC-01/09-01/11-89 and ICC-01/09-02/11-91, 13 May 2011, paras. 37-60 (hereinafter “Reply of 13 May 2011”).

¹⁰ “Application for an Oral Hearing Pursuant to Rule 58(2),” 17 May 2011, para. 20, 21.

before the Court.¹¹ In the same decision, the Chamber rejected the Government's application for an oral hearing.¹² The Court further determined that the Government of Kenya's Cooperation Request of 21 April 2011 "has no linkage with the issue of admissibility" and stated that it would decide on this request in a separate decision.¹³

19. On 31 May 2011, the Government of Kenya filed a request for the Chamber to decide its request of 18 May 2011 for leave to reply to the Prosecutor's Response of 10 May 2011 before it decided on the merits of the Cooperation Request. The Government stressed that it should have a fair opportunity to respond to all the allegations made against the Government before any final decision was made by the Chamber on the merits of the Government's Request for Assistance.¹⁴ This filing was not a new request for leave to reply – it repeated the request of 18 May 2011 and asked for it to be decided in a separate decision before any decision on the merits was handed down.

20. On 29 June 2011, the Pre-Trial Chamber issued its Decision on the Cooperation Request in which the Pre-Trial Chamber rejected the Government of Kenya's Cooperation Request on the basis that the "two-page Cooperation Request ... lacked any documentary proof that there is or has been an investigation."¹⁵ The Decision also rejected the request for leave to reply of 18 May 2011 because the Admissibility Decision had rendered this request "moot" and the request of 31 May 2011 on the basis that the Government's arguments did "not justify granting it."¹⁶

E. Grounds of Appeal

21. The Government of Kenya's appeal is based on errors of fact, procedure and law.

Factual errors

22. It was a fundamental error of fact for the Pre-Trial Chamber to hold that the Government of Kenya failed to satisfy the requirements of Article 93(10)(a) because

¹¹ Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-101, ICC-01/09-02/11-96, 30 May 2011.

¹² ICC-01/09-01/11-101, paras. 36-42; ICC-01/09-02/11-96, paras. 32-38.

¹³ ICC-01/09-01/11-101, paras. 32-35; ICC-01/09-02/11-96, paras. 28-31.

¹⁴ Request on behalf of the Government of Kenya in respect of its Application for Leave to Reply to the Prosecutor's Response of 10 May 2011 and Corrigendum of 11 May 2011 to 'Request for Assistance on behalf of the Government of Republic of Kenya pursuant to Article 93(10) and Rule 194', ICC-01/09, 31 May 2011, para. 4.

¹⁵ Cooperation Request Decision, para. 34.

¹⁶ Cooperation Request Decision, para. 18, 22.

the Government's "two-page Cooperation Request, ... lacked any documentary proof that there is or has been an investigation."¹⁷

23. The Government of Kenya *did* provide the Chamber with evidence and information which shows that the Government of Kenya is conducting an ongoing investigation into Post-Election Violence including the six ICC Suspects. At paragraph 3 of the Government of Kenya's Cooperation Request, the Government of Kenya clearly and expressly stated that **"The Government has informed the Court that it is conducting an investigation at all levels in respect of all persons against whom there may be allegations of participation in Post-Election Violence."**¹⁸ The Government of Kenya directed the Pre-Trial Chamber to the documents and materials the Government had filed with the Chamber which provided the Chamber with evidence of the Government of Kenya's ongoing investigation.¹⁹ Footnote 1 of the Cooperation Request referred the Chamber to the Government of Kenya's Admissibility Application filed on 31 March 2011 which informed the Court that there is an ongoing investigation.²⁰ Additionally, footnote 1 of the Cooperation Request asked the Chamber to consider the documentary evidence provided to the Court in the Filing of Annexes of 21 April 2011,²¹ filed the same day as the Cooperation Request, which provided the Chamber with documentary evidence of the ongoing investigation in Kenya, including a letter from the Attorney-General and a lengthy report on the thousands of cases concerning Post-Election Violence.²²

24. The Government of Kenya provided further documentary proof that a national investigation was currently underway in its Reply of 13 May 2011. In this Reply the Government of Kenya detailed the background, history and status of the current investigation,²³ and annexed documentary proof of the investigation through letters, statements and progress reports about the investigation from the Director of Public Prosecutions, the Commissioner of Police, and the Director of Criminal

¹⁷ Cooperation Request Decision, para. 34.

¹⁸ Cooperation Request of 21 April 2011, para. 3.

¹⁹ Cooperation Request of 21 April 2011, fn. 1.

²⁰ Admissibility Application of 31 March 2011, paras. 4, 12, 13, 17, 33, 35, 36, 46, 66, 71, 72, 74, 79.

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

²² Filing of Annexes of 21 April 2011, Annex 1, 2, 3. It should be taken into account that the Government of Kenya requested evidence from the ICC that may be relevant to *all* cases, not only the six Suspects.

²³ Reply on behalf of the Government of Kenya to the Responses of the Prosecutor, Defence, and OPCV to the Government's Application pursuant to Article 19 of the Rome Statute, ICC-01/09-01/11-89 and ICC-01/09-02/11-91, 13 May 2011, paras. 37-60 (hereinafter "Reply of 13 May 2011").

Investigations.²⁴ This documentation confirmed that the six Suspects were “being exhaustively investigated by the CID/CPD team” and described to the Chamber the investigative actions that were in progress.²⁵ If the Chamber was not convinced by the documentary evidence of an investigation provided by the Government of Kenya, the Chamber could have heard directly from the Commissioner of Police in charge of the investigation.²⁶

25. The materials that evidenced an ongoing investigation into Post-Election Violence at all levels, including in respect of the six Suspects and also in respect of the thousands of other suspects, was undoubtedly before the Pre-Trial Chamber. The Cooperation Request did not lack documentary proof of an investigation to satisfy the requirements of Article 93(10)(a). The Chamber chose to ignore this evidence and in effect rely on a highly technical reason to reject the Cooperation Request – that the materials were not appended to the Cooperation Request. The materials were expressly referred to in the Cooperation Request, and the materials were before the Chamber. It cannot be said that the Chamber was unaware of the Government of Kenya’s submission that an investigation was ongoing. It is overly technical in the extreme to reject the Cooperation Request on the basis that the evidence must be appended to the Cooperation Request. If the Chamber had believed this was required, it could have asked the Government of Kenya to submit, once again, all of the evidence with the Cooperation Request before it ruled on the Request. It would have been a duplicative and unnecessary process, but the Government could then at least have had a fair chance to have the substance of its Cooperation Request considered by the Chamber. The decision of the Chamber instead shows what some or many may see as the Chamber’s absolute determination to find a way of rejecting the Government’s Request. To be perceived as vulnerable to such treatment by the very court Kenya has supported from its creation is embarrassing or humiliating for Kenya and potentially unfortunate for the future of the Court. Kenya is entitled to be treated with respect and its assertions are not to be circumvented by procedure or treated as worthless without evidence and reason.

²⁴ Reply of 13 May 2011, Annex 1, 2, 6. See also, Reply of 13 May 2011, paras. 57, 58.

²⁵ Reply of 13 May 2011, para. 56

²⁶ Reply of 13 May 2011, para. 7; Application for an Oral Hearing Pursuant to Rule 58(2), 17 May 2011, para. 20, 21.

26. The Government of Kenya's appeal against the Cooperation Request Decision meets the standard set by the Appeals Chamber for a successful appeal, namely that "the error raised by an appellant must have materially affected the impugned decision ... [in that] the decision would have been 'substantially different'."²⁷ The Chamber rejected the Cooperation Request on the sole basis that there was no evidence of an ongoing national investigation. As a result the Chamber did not go on to consider any of the arguments raised by the parties. Had the Chamber considered the evidence of a national investigation to which it was directed, the decision would have been substantially different. It would have had to conclude that this requirement in Article 93(10) was satisfied. The Chamber would have had to decide whether to grant the Cooperation Request. In the Government of Kenya's submission there were no proper reasons to refuse the Request.

Procedural errors

27. The Pre-Trial Chamber committed a serious procedural error in refusing the Government of Kenya an opportunity to reply to the Prosecutor's Response to the Cooperation Request of 10 May 2011. The Government of Kenya filed its application for leave to reply on 18 May 2011. It made a further filing on the issue on 31 May 2011, a day after the Admissibility Decision in which the Chamber had indicated that a separate decision on the Cooperation Request would be delivered.²⁸ *This was not a new request for leave.* It repeated the same request for leave for the same reasons. It was filed in order to emphasise that the Government of Kenya was requesting that the application for leave to reply of 18 May 2011 be decided in a separate ruling before the Chamber made its ruling on the merits. The Government had made the same request in respect of its application for an oral hearing for its Admissibility Application (i.e. to decide on the application in a separate decision before rendering the final decision on the Admissibility Application), but the Chamber refused its application for an oral hearing in the same decision on the merits of the Admissibility Application. The Government of Kenya wished to have a right of appeal should the Chamber refuse its application for leave to reply of 18 May 2011 *before* the merits of the Cooperation Request were decided.

²⁷ *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07, 25 September 2009, para. 37.

²⁸ ICC-01/09-01/11-101, para. 35; ICC-01/09-02/11-96, para. 31.

28. The Pre-Trial Chamber rejected the Request for Leave to Reply of 18 May 2011 on the basis that it held that the “reliefs sought were mainly to be considered in view of and for the sake of being heard before the admissibility challenge has been decided”²⁹. The Chamber reasoned that because it had decided the admissibility challenge, the application for leave to reply had become “moot”. This decision is illogical and irrational. The Government of Kenya had applied for leave to reply on **18 May 2011** – this was 12 days *before* the Chamber issued its Admissibility Decision on **30 May 2011**. The Chamber did not decide the application for leave until after it issued its decision on admissibility, but used the fact that it had issued its decision on admissibility as the very reason to refuse the application for leave to reply. Once again, it shows that the Pre-Trial Chamber was determined to reject all applications filed by the Government of Kenya.

29. Moreover, the Government of Kenya never suggested that it needed to reply to establish the link between the Admissibility Application and the Cooperation Request. It needed to reply to address the issues that were relevant to the determination of the Cooperation Request itself. The Government of Kenya sought leave to reply to address the various submissions and allegations made by the Prosecutor in his Response to the Cooperation Request, including (i) the Prosecutor’s erroneous assertion that Kenya had not established that there was an ongoing national investigation and (ii) the Prosecutor’s argument that a request for materials solely within the possession of the Prosecution is not subject to judicial determination under Article 93(10) and Rule 194.³⁰ Both of these issues were directly relevant to the outcome of the Cooperation Request as the Pre-Trial Chamber rejected the Cooperation Request based on a lack of evidence of a national investigation³¹ and agreed with the Prosecutor’s argument that materials in the possession of the Prosecution are not subject to judicial determination.³² The Chamber thus adopted the Prosecutor’s arguments without giving the Government of Kenya an opportunity to first reply to them. The error materially affected the impugned decision as the

²⁹ Cooperation Request Decision, para. 18.

³⁰ Request for Leave to Reply of 18 May 2011, paras. 9, 11.

³¹ Cooperation Request Decision, para. 34.

³² Cooperation Request Decision, para. 31. The Pre-Trial Chamber stated that “the Chamber cannot order the Prosecutor to provide any material or evidence in his ‘possession’ to any State, pursuant to a request under article 93(10) of the Statute, as this is a matter that falls entirely within his power.” This error of law is a further ground relied on by the Government of Kenya in its appeal, which will be elaborated on in its Document in support of the Appeal to be filed within 21 days.

Government's Reply would have addressed *the* arguments used by the Chamber to reject the Cooperation Request.

30. The Chamber also rejected the Government of Kenya's request of 31 May 2011. The Chamber characterised this filing as "an *ex novo* request". Yet, as plainly stated in the filing of 31 May 2011 the Government of Kenya was only asking the Chamber to decide on its existing application for leave to reply of 18 May 2011 before it rendered its decision on the merits of the Cooperation Request.³³ In this filing the Government of Kenya did not therefore raise or rely on any different reasons for seeking to reply to the Prosecutor's Response. Its reasons for seeking a reply were as before – to address all of the arguments put forward by the Prosecution, and not only those concerned with alleged security concerns and witness intimidation. The Pre-Trial Chamber, however, erroneously referred only to the allegations of security concerns. It focused in on one paragraph in the filing (about ensuring that there was a record before the Court in response to the Prosecutor's allegations of witness intimidation) to find that the arguments raised by the Government did not justify granting leave to reply.³⁴ The Chamber ignored that the Government sought leave to reply to the Prosecutor's argument that no investigation was underway – obviously a material issue as the Chamber relied on it to refuse the Cooperation Request.

F. Relied sought

31. The Government of Kenya respectfully requests the Appeals Chamber to overturn the Cooperation Request Decision and to grant the Government's request for access to the evidence in the possession of the Pre-Trial Chamber and the Prosecutor pursuant to Article 93(10), subject to appropriate protective measures being put in place.

³³ See Request of 31 May 2011, para. 1.

³⁴ Cooperation Request Decision, para. 22.



Sir Geoffrey Nice QC

Rodney Dixon

Counsel on behalf of the Government of the Republic of Kenya

Dated 4th July 2011

London, United Kingdom