



Original: English

No.: ICC-01/09  
Date: 29 May 2012

**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**

**Decision on the Government of Kenya's Application for Leave to Appeal Pursuant  
to Article 82(1)(d) of the Rome Statute**

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

**The Office of the Prosecutor**

Luis Moreno-Ocampo, Prosecutor  
Fatou Bensouda, Deputy 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

**Other**

Appeals Chamber

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**PRE-TRIAL CHAMBER II** (the “Chamber”) of the International Criminal Court (the “Court”), issues this decision on the “Government of Kenya’s Application for Leave to Appeal the ‘Decision on the Request for Assistance Submitted on Behalf of the Government [...] Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence’” ( the “Application”).<sup>1</sup>

## **I. PROCEDURAL HISTORY**

1. On 31 March 2010, the Chamber authorized, by majority, the commencement of an investigation into the situation in the Republic of Kenya in relation to crimes against humanity committed between 1 June 2005 and 26 November 2009.<sup>2</sup>

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 “Cooperation Request”) under article 93(10) of the Rome Statute (the “Statute”), 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”.<sup>3</sup>

3. On 29 June 2011, the Chamber issued its decision, *inter alia*, rejecting the Cooperation Request (“Decision on the Cooperation Request”).<sup>4</sup>

4. On 4 July 2011, the GoK directly appealed before the Appeals Chamber the Decision on the Cooperation Request pursuant to article 82(1)(a) of the Statute. On the same date, the GoK also lodged with the Chamber, in the alternative, the Application under article 82(1)(d) of the Statute, in which it requests leave to appeal on the following three alleged issues:

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<sup>1</sup> ICC-01/09-71.

<sup>2</sup> 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.

<sup>3</sup> ICC-01/09-58, paras 1-2.

<sup>4</sup> ICC-01/09-63.

- a. [A]n error of fact in holding that the Cooperation Request “lacked any documentary proof that there is or has been an investigation” ;
- b. [A]n 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 2011; and
- c. [A]n 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).<sup>5</sup>

5. On 8 July 2011, the Prosecutor responded to the Application requesting the Chamber to reject it.<sup>6</sup>

6. On 10 August 2011, the Appeals Chamber dismissed *in limine* the appeal lodged by the GoK pursuant to article 82(1)(a) of the Statute on the ground that the Decision on the Cooperation Request “does not constitute a ‘decision with respect to admissibility’” as asserted by the GoK.<sup>7</sup>

## II. APPLICABLE LAW

7. The Chamber notes articles 21(1)(a), (2), (3) and 82(1)(d) of the Rome Statute (the “Statute”) and rule 155 of the Rules of Procedure and Evidence.

## III. THE CHAMBER’S DETERMINATION

8. According to article 82(1)(d) of the Statute, the Chamber may grant a request for leave to appeal from “[e]ither party” when the following requirements are fulfilled:

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<sup>5</sup> ICC-01/09-71, para. 2.

<sup>6</sup> “Prosecution’s Response to the ‘Government of Kenya’s Application for Leave to Appeal the ‘Decision on the Request for Assistance Submitted on Behalf of the Government [...] Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence’”, ICC-01/09-73.

<sup>7</sup> Appeals Chamber, “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.

a) The decision involves an “issue” that would significantly affect (i) both the “fair” and “expeditious” conduct of the proceedings (ii) or the outcome of the trial; and

b) In the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.

9. In this regard, the Chamber recalls the first decision on interlocutory appeals dated 19 August 2005, in which this Chamber, albeit with different composition, held that when examining an application for leave to appeal under article 82(1)(d) of the Statute, it must be guided by three main principles: a) the restrictive nature of the remedy provided in this provision; b) the need for the applicant to satisfy the Chamber as to the fulfillment of the requirements embodied in this provision; and c) the irrelevance of addressing arguments concerning the merits of the appeal.<sup>8</sup> The Chamber also recalls the Appeals Chamber’s judgment of 13 July 2006 (the “13 July 2006 Judgment”), which considers that the object of the remedy provided in article 82(1)(d) of the Statute, is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.<sup>9</sup>

10. It is clear from the language articulated in article 82(1)(d) of the Statute that granting the relief sought in paragraph 19 of the Application and developed in paragraphs 6-18 not only requires the existence of an “appealable issue” amounting from the Decision on the Cooperation Request, but also that the said “issue would significantly affect the “fair and expeditious conduct of the *proceedings*”.

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<sup>8</sup> Pre-Trial Chamber II, “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 15; “Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06”, ICC-02/04-112, para. 16; see also Trial Chamber I, “Decision on two requests for leave to appeal the ‘Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application’”, ICC-01/04-01/06-2779, para. 10.

<sup>9</sup> Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, para. 19.

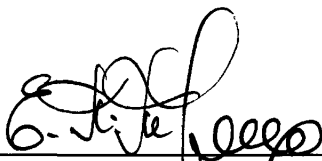
11. The Chamber considers that the reference to “proceedings” in the context of article 82(1)(d) of the Statute aims only at the judicial process *before the Court*. Given that the subject-matter of the Decision on the Cooperation Request concerns *national proceedings* and that the issues allegedly amounting from this decision subject to appeal also relate to domestic activities, the Chamber is of the view that “issue(s)” of such a nature would not affect the fair or expeditious conduct of the proceedings or the outcome of the trial *before the Court* as required by article 82(1)(d). Accordingly, the Chamber finds no need to either address in any detail the requirements under article 82(1)(d) of the Statute or engage with the merits of the Application.

12. Furthermore, in light of this outcome, the Chamber deems it unnecessary to examine the issue of whether the GoK might be considered as a party within the meaning of the *chapeau* of article 82(1) of the Statute.

**FOR THESE REASONS, THE CHAMBER, HEREBY**

- a) rejects the Application;
- b) orders the Registrar to notify this decision to the Government of the Republic of Kenya.

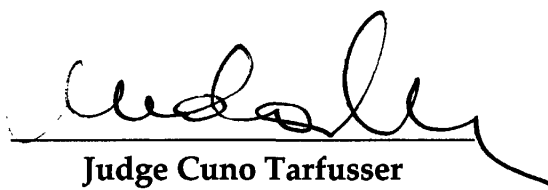
Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova  
Presiding Judge



Judge Hans-Peter Kaul  
Judge



Judge Cuno Tarfusser  
Judge

Dated this Tuesday, 29 May 2012

At The Hague, The Netherlands