

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09
Date: 18 February 2010

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

Public

Decision Requesting Clarification and Additional Information

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

Counsel for the Defence

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

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Silvana Arbia, Registrar
Didier Preira, Deputy-Registrar

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 renders this decision requesting additional information in relation to the request for authorization submitted by the Prosecutor under article 15 of the Rome Statute (the “Statute”).

1. On 26 November 2009, the Prosecutor filed the “Request for authorisation of an investigation pursuant to Article 15” together with 40 appended annexes, in which he requested the Chamber to “authorise the commencement of an investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008” (the “Prosecutor’s Request”).¹

2. On 10 December 2009, the Chamber issued an “Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute”.²

3. On 11 January 2010, Professors Max Hilaire and William A. Cohn (the “Applicants”) submitted an application to appear as *amicus curiae* for the sake of filing observations on some issues related to the Prosecutor’s Request “within 30 days or within such period” to be decided by the Chamber (the “*Amicus Curiae* Application”).³

4. On 15 January 2010, the Prosecutor submitted a request for leave to respond to the *Amicus Curiae* Application (the “Prosecutor’s Request for Leave to Respond”).⁴

5. On 20 January 2010, a legal representative for one of the victims filed a response to the *Amicus Curiae* Application in which he requested the Chamber to reject it on several grounds (the “Legal Representative’s Request”).⁵

¹ ICC-01/09-3 and its annexes.

² ICC-01/09-4.

³ ICC-01/09-8.

⁴ ICC-01/09-9.

6. On 27 January 2010, the Applicants responded to the Legal Representative's Request⁶ as well as to the Prosecutor's Request for leave to Reply (the "Applicants' Requests").⁷

7. On 3 February 2010, the Chamber rejected the *Amicus Curiae* Application, the Prosecutor's Request for Leave to Respond, the Legal Representative's Request and the Applicants' Requests.⁸

8. The Chamber notes articles 7(1) and (2)(a), 15(4), 17 and 53(1)(b) of the Statute, rule 50(4) and (5) of the Rules of Procedure and Evidence (the "Rules"), regulations 28 and 49(2)(c) of the Regulations of the Court (the "Regulations"), and regulations 33 and 34 of the Regulations of the Office of the Prosecutor (the "OTP Regulations").

9. The Chamber notes in particular, rule 50(4) of the Rules, according to which, the Pre-Trial Chamber may request "additional information from the Prosecutor", should it deem necessary to issue its decision on the Prosecutor's Request.

10. The Chamber notes also regulation 28(1) of the Regulations pursuant to which a Chamber may order the participants "to clarify or to provide additional details on any document within a time limit specified by the Chamber".

11. The Chamber examined the Prosecutor's Request as well as the approximately 1500 pages of supporting materials, and considers it essential that the Prosecutor provides the Chamber with additional information and clarification with respect to the following requirements: (1) the State and/or organizational policy under article 7(2)(a) of the Statute, and (2) admissibility within the context of the situation in the Republic of Kenya.

⁵ ICC-01/09-11.

⁶ ICC-01/09-12.

⁷ ICC-01/09-13.

⁸ Pre-Trial Chamber II, "Decision on Application to Appear as *Amicus Curiae* and Related Requests", ICC-01/09-14.

12. With respect to the first of the foregoing requirements, the Prosecutor claims in his request for authorization that the acts committed on the territory of the Republic of Kenya within the context of the 2007-2008 post-election violence appear to constitute crimes against humanity. In this regard, the Chamber notes that to meet the requirements of a crime against humanity under the Statute, the acts committed must, *inter alia*, be carried out "pursuant to or in furtherance of a State or organizational policy" within the meaning of article 7(2)(a) of the Statute.

13. On examination of the Prosecutor's Request and the supporting materials, the Chamber observes that there are references to different events, *inter alia*, meetings of local leaders, businessmen, and politicians,⁹ some of whom allegedly provided financial as well as other means to support or exacerbate the violence.¹⁰ Other references concern allegations of police involvement in the commission of certain acts.¹¹ However, the Chamber would like to receive additional information and more

⁹ Human Rights Watch (HRW), "From Ballots to Bullets", March 2008, ICC-01/09-3-Anx3, pp. 8-9, 41-42, 44-45, 49-50, 53, 58; Kenyan National Commission on Human Rights (KNCHR), "On the Brink of the Precipice: a Human Rights Account of Kenya's Post-2007 Election Violence", 15 August 2008, ICC-01/09-3-Anx4, paras 259-260, 265, 316-317, 322-324, 339, 509; Commission of Inquiry into Post-Election Violence (CIPEV), "Final Report", 16 October 2008, ICC-01/09-3-Anx5, pp. 80-83, 86, 103, 133-134, 135, 136, 226; OHCHR, "Report from the OHCHR Fact-finding Mission to Kenya, 6-28 February 2008", ICC-01/09-3-Anx7, p. 11; Oscar Foundation Report, "Ethnicity and a failed democracy", February 2008, ICC-01/09-3-Anx12, p. 14.

¹⁰ HRW, "From Ballots to Bullets", March 2008, ICC-01/09-3-Anx3, pp. 40, 42-43, 49, 52, 55-56, 58; KNCHR, "On the Brink of the Precipice: a Human Rights Account of Kenya's Post-2007 Election Violence", 15 August 2008, ICC-01/09-3-Anx4, paras 158, 165, 166, 205, 207, 212, 250, 261, 305, 318, 326-330, 338, 356-358, 511, 536; CIPEV, "Final Report", 16 October 2008, ICC-01/09-3-Anx5, pp. 96, 133-134, 142, 237, 421; International Crisis Group, "Kenya in Crisis", 21 Feb. 2008, ICC-01/09-3-Anx6, p.16; Office of the High Commissioner for Human Rights (OHCHR), "Report from the OHCHR Fact-finding Mission to Kenya, 6-28 February 2008", ICC-01/09-3-Anx7, pp. 8-9, 11, 12; Oscar Foundation Report, "Ethnicity and a failed democracy", February 2008, ICC-01/09-3-Anx12, pp. 14, 15.

¹¹HRW, "From Ballots to Bullets", March 2008, ICC-01/09-3-Anx3, pp. 29, 34, 35; KNHCR, "On the Brink of the Precipice: a Human Rights Account of Kenya's Post-2007 Election Violence." 15 August 2008, ICC-01/09-3-Anx4, paras 177-179, 217, 282, 350, 402, 435; CIPEV, "Final Report", 16 October 2008, ICC-01/09-3-Anx5, pp. 167, 195, 408-410; Federation of Women Lawyers (FIDA-K), "Submissions To The Commission Of Inquiry Into The Post Election Violence (The Waki Commission) By Fida-K On Sexual And Gender Based Violence" On Behalf Of The Inter Agency Gender Based Violence (Gbv) Sub-Cluster", 11 September 2008, ICC-01/09-3-Anx8, pp. 4, 6; UNFPA, UNICEF, UNIFEM, Christian Children's Fund, "A Rapid Assessment of Gender Based Violence During the Post-Election Violence in Kenya", January - February 2008, ICC-01/09-3-Anx9, p. 34 ; Center for Rights Education and Awareness (CREA), "Women paid the Price", 2008, ICC-01/09-3-Anx10, p. 41; Report of the Special

clarity on the linkage between, on the one hand, such events, the persons involved, the acts of violence allegedly committed in the various regions of the Republic of Kenya during different periods of time and, on the other hand, a policy of a State or one or more organizations.

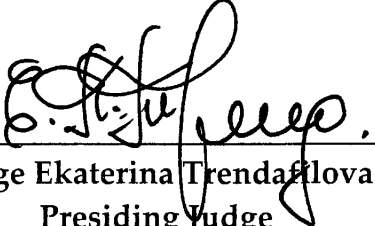
14. As for the second of the foregoing requirements, the Chamber notes that according to regulation 49(2)(c) of the Regulations, the Prosecutor's Request shall indicate, *inter alia*, "[t]he persons involved, if identified, or a description of the persons or groups of persons involved". The Chamber also takes note of regulations 33 and 34 of the OTP Regulations, which makes clear that in identifying potential cases within the stage of preliminary examination, the Prosecutor shall "identify the incidents to be investigated and the person or persons who appear to be the most responsible". Accordingly, the Chamber wishes to receive more recent information on: (1) the incidents that are likely to be the focus of an investigation; (2) the groups of persons involved that are likely to be the target of an investigation for the purpose of identifying the potential cases under consideration; and (3) domestic investigations, if any, with respect to those potential cases as constituted by the previous two elements.

Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/11/2/Add.6, "Mission to Kenya", 26 May 2009, ICC-01/09-3-Anx11, pp. 27-29, 34, 36, 53-54.

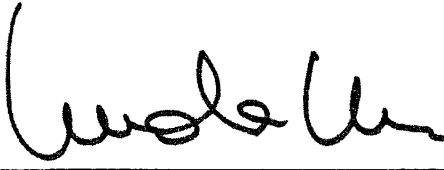
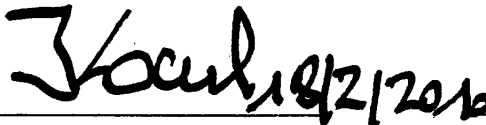
FOR THESE REASONS, THE CHAMBER HEREBY

requests the Prosecutor to provide the Chamber, no later than 3 March 2010, with the additional information and clarification outlined in paragraphs 13 and 14 of this decision.

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



Judge Ekaterina Trendaklova
Presiding Judge



Judge Hans-Peter Kaul
Judge

Judge Cuno Tarfusser
Judge

Dated this Thursday, 18 February 2010

At The Hague, The Netherlands