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PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

*IN THE CASE OF
PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA
AND MOHAMMED HUSSEIN ALI*

Public Document

Application for an Oral Hearing Pursuant to Rule 58(2)

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:

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A. Introduction

1. The Government of Kenya files this application to request an oral hearing before the Pre-Trial Chamber pursuant to Rule 58(2) for its Admissibility Application of 31 March 2011. The Government requests that such a hearing is scheduled *before* a final decision is taken by the Chamber on the Admissibility Application for all of the reasons set out herein. The Application is of such national importance to Kenya as a State Party of the ICC that the Government of Kenya urges the Chamber to say that the Government *must* be heard at an oral hearing. Such a hearing will also permit the most up-to-date information on the state of the national investigation into the six suspects to be given at the time of the hearing, and for the Chamber to hear directly from the Kenyan authorities conducting the national investigation.¹
2. The Chamber is requested to render its decision on an oral hearing in a separate decision before any final decision is handed down on the Admissibility Application itself. The admissibility challenge is of such significance to the Government of Kenya, and to the future of the proceedings as a whole, that were the Chamber minded to refuse the Government's request for an oral hearing, the Government would seek to appeal this decision before any final decision is made about the Admissibility Application. The Government mentions this possibility in advance, as is probably obvious in any event, because of the possible effect that any appeal might have on the timetable of issuing a decision on the Application, and not, of course, *in terrorem*.
3. Rule 58(2) expressly provides the Pre-Trial Chamber with the power to hold an oral hearing: "*It may hold a hearing*".² To the extent that the Chamber may be concerned that such a hearing will delay the proceedings as a whole, the Government asks that such a hearing be scheduled to take place *before* the confirmation hearing in this case that has been fixed for 21 September 2011. The overall proceedings will not be delayed by holding an oral hearing in the period preceding the date for the confirmation hearing. It is worth noting that Rule 58(2) envisages that an

¹ The Chamber could also be provided with the latest information on the appointment of the new Chief Justice, DPP and other positions. The nominations for the new Chief Justice, Deputy Chief Justice and DPP have now been finalised and forwarded to Parliament.

² Unlike the right of reply of an Applicant, which as pointed out by the Pre-Trial Chamber, is not expressly provided for in the Rule 58: see Decision under Regulation 24(5) of the Regulations of the Court on the Motion Submitted on Behalf of the Government of Kenya, 2 May 2011, para. 13.

admissibility challenge could be joined “to a confirmation ... proceeding as long as this does not cause undue delay”.

4. Most importantly, as set out below, there are substantial issues of law and evidence which justify holding an oral hearing and which are vital to Kenya and its citizens at a critical moment in the development of its criminal justice system following the Post-Election violence.
5. It must be taken into account that although this is the first case in which a State Party has made an admissibility challenge relying on the principle of complementarity, in all other cases in which admissibility has been raised by the accused, oral hearings have been permitted when requested.

B. Decision on conduct of proceedings silent on an oral hearing

6. On 31 March 2011 the Government of Kenya filed its Admissibility Application in which, *inter alia*, it specifically requested that the Pre-Trial Chamber schedule an oral hearing:

“Furthermore, before any final determination of the present Application is made by the Pre-Trial Chamber, the Government of Kenya requests that an oral hearing is scheduled, in consultation with the parties, to permit the Government the opportunity to address the Pre-Trial Chamber in respect of its Application. The Application is plainly of vital importance to the national interest and future of Kenya and its people. It is particularly critical to the future course of judicial proceedings in Kenya, and is thus clearly a matter to be dealt with at a public hearing before the Pre-Trial Chamber so that all relevant arguments can be submitted and considered. (As noted above, this is the first time that an application made by a State Party under Article 19 is being considered before the ICC.)”³

7. The Pre-Trial Chamber’s decision of 4 April 2011 on the conduct of the proceedings under Rule 58 did not specifically address this request for an oral hearing. The Chamber addressed the Government’s request for a status conference to be held to decide on a procedure under Rule 58 to conduct the proceedings in respect of the

³ Government’s Application of 31 March 2011, para. 20.

Admissibility Application,⁴ the Government's request concerning its participation during the 7/8 April 2011 initial hearings,⁵ and the submission of written observations by the parties.⁶ However, the decision was silent on the Government's request for an oral hearing on the merits of the Admissibility Application.⁷

C. Reasons for oral hearing

8. Rule 58(2) provides that the Chamber "shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing."
9. The Pre-Trial Chamber has a wide discretionary power to decide on what measures should be ordered to ensure the proper conduct of the proceedings.⁸ This Rule specifically identifies the power to grant a hearing as a measure to guarantee the *proper* conduct of the proceedings, and thus to decide whether a hearing "best suits the circumstances" of the case.⁹
10. The Government of Kenya fully acknowledges the Chamber's concern "to avoid unnecessary delays of the entire proceedings"¹⁰ and has hence requested that the oral hearing take place in the period of time before the confirmation hearing is presently scheduled so that it does *not* serve to delay these proceedings.
11. There are four reasons for granting the Government's request for an oral hearing, each of which, and cumulatively, demonstrate that an oral hearing is an "appropriate

⁴ Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 4 April 2011, para. 9-10.

⁵ *Id.* at para. 11.

⁶ *Id.* at para. 12.

⁷ See request as set out in the Government's Application of 31 March 2011, para. 20 (cited above).

⁸ The Pre-Trial Chamber has recognised that it is bestowed with broad powers to organise the proceedings in a manner that "best suits the circumstances of each particular case", see Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 4 April 2011, para. 8.

⁹ Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 4 April 2011, para. 8.

¹⁰ Decision under Regulation 24(5) of the Regulations of the Court on the Motion Submitted on Behalf of the Government of Kenya, 2 May 2011, para. 15.

measure for the proper conduct of the proceedings”¹¹ and “best suits the circumstances”¹² of the present case:

(i) “Public” consideration and determination of important issues

12. The overriding principle that “justice must be done and be seen to be done” underlies the Government’s request for an oral hearing. The Kenyan Government has raised the admissibility challenge based, *inter alia*, on its comprehensive and widely publicised reform program and in light of the national investigation that is underway in respect of the six suspects. Its Application must be considered in detail and with complete transparency to do justice to the arguments it raises and so that the Kenyan public and the international community can observe the workings of the Court in determining this critical issue.
13. The outcome of this application will have far-reaching consequences for Kenya and its people. The finding of the ICC will in part determine whether Kenya is able to restore public confidence in its reformed and reforming criminal justice system which has been the subject of much attention since the Post-Election violence. The Application cannot properly be decided on the written pleadings alone. An oral hearing will provide the Court, the parties and the public with the chance openly to examine all relevant aspects of the Application, and in particular the extent to which the principle of complementarity can and should be observed in the case of Kenya.
14. The Court will be able to assess and probe each argument relied on by the Government and the parties through an oral hearing. Written pleadings do not permit the parties to question and answer each other’s submissions, or, most importantly, the Court to test the parties’ assertions and evidence. Significant questions can remain unanswered in written pleadings, only to be unearthed in oral argument.
15. Moreover, the public will be able to see and assess the legal submissions of the parties and the approach of the Court through an oral hearing. It will guarantee that the public will not feel excluded from the international legal process having such a fundamental effect on the future of the criminal justice system in Kenya in advance of the next

¹¹ Rule 58(2).

¹² Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 4 April 2011, para. 8.

national elections in 2012. In international proceedings that could either approve or condemn Kenya's criminal justice system, it is essential that the Court use every available mechanism to hear and examine all relevant arguments and receive all relevant evidence, and be seen by the parties and the public to do so.

16. As the *first* Article 19 application made by any State Party, Kenya should be given the opportunity to present its arguments before the Chamber represented by Counsel in person and for the Chamber to hear the evidence it relies on (as the Prosecutor has noted, "this is the first time this Court has considered a challenge brought by a State Party to admissibility, and it does not oppose allowing additional deference to a State in this circumstance."¹³).

17. In addition, the determination of the Application could have implications beyond the future of the judicial system in Kenya. The decision will interpret and significantly develop the limited jurisprudence on the application of the principle of complementarity. It will establish standards for admissibility for Kenya and for other countries. At present there are numerous national investigations underway into crimes allegedly within the jurisdiction of the Rome Statute.¹⁴ These countries will look to the decision on Kenya to offer them guidance on which cases should be tried by them as opposed to the ICC. It will be most important for the ICC, and the goals of international justice, that standards are developed that can and will be applied equally to all States. An oral hearing will permit the Chamber to have these critical questions argued before it, to assist the Chamber, and for Kenya and other States to benefit from the public nature of the proceedings.

18. It must be taken into account that ICC Chambers have granted oral hearings on admissibility issues in every case where an oral hearing has been requested.¹⁵ The Chambers in *Bemba* and *Katanga* both recognised the importance of the State Party's presence and arguments before the Court as being "indispensable" in granting oral

¹³ Prosecution's response to the Government of Kenya's request to reply, 21 April 2011, para. 3.

¹⁴ See Admissibility Application of 31 March 2011, para. 18 and fn. 8 in which investigations in Colombia, Russia, Georgia and Afghanistan are mentioned.

¹⁵ *Prosecutor v. Katanga*, Order to Convene a Hearing (rule 58(2) of the Rules of Procedure and Evidence), ICC-01/04-01/07, 7 May 2009, para. 5.; *Prosecutor v. Katanga*, Order Postponing the Hearing Relating to the Challenge to Admissibility (Rule 58(2) of the Rules of Procedure and Evidence), ICC-01/04-01/07, 15 May 2009, para. 2, 4.; *Prosecutor v. Katanga*, Order to Convene a Hearing (rule 58(2) of the Rules of Procedure and Evidence), ICC-01/04-01/07, 22 May 2009, para. 4, 7; *Prosecutor v. Bemba*, Status Conference Hearing, ICC-01/05-01/08, 27 April 2010, pg. 69, ln. 6-10.; *Prosecutor v. Bemba*, Status Conference with Registry, OTP, Defence and OPCV, ICC-01/05-01/08, 8 March 2010, pg. 11, ln.9-pg. 12, ln. 2.

hearings on admissibility issues.¹⁶ The Chamber in *Katanga*, in recognising the Government of the DRC as an “indispensable” party, granted a hearing in order fully to consider the views of the State even though the DRC had not cooperated with the Court in making written filings before the Court.¹⁷ Additionally, Pre-Trial Chamber III in *Bemba* noted that an oral hearing was important to a “proper consideration” of the admissibility application (by the accused) and stated that the oral hearing “enabled [the Court] to address what is a relatively complicated issue extremely expeditiously and helpfully.”¹⁸

19. The Government of Kenya must be afforded the same rights as other Governments have enjoyed before the ICC, especially since the admissibility challenge has been made by the Government of Kenya itself.

(ii) The status of the national investigation and oral evidence

20. An oral hearing will permit the Chamber to receive the most up-to-date information on the national investigation into the six suspects. The Chamber can hear from the Commissioner of Police himself who is in charge of the investigation. It is essential that the Chamber has the most up-to-date information on the national investigation before it renders its final decision. The Government is proceeding as rapidly as possible in advancing its investigation so that it can be concluded as expeditiously as possible.

¹⁶ *Prosecutor v. Katanga*, Order to Convene a Hearing (rule 58(2) of the Rules of Procedure and Evidence), ICC-01/04-01/07, 7 May 2009, para. 5.; *Prosecutor v. Katanga*, Order Postponing the Hearing Relating to the Challenge to Admissibility (Rule 58(2) of the Rules of Procedure and Evidence), ICC-01/04-01/07, 15 May 2009, para. 2, 4.; *Prosecutor v. Katanga*, Order to Convene a Hearing (rule 58(2) of the Rules of Procedure and Evidence), ICC-01/04-01/07, 22 May 2009, para. 4, 7; *Prosecutor v. Bemba*, Status Conference Hearing, ICC-01/05-01/08, 27 April 2010, pg. 69, ln. 6-10.

¹⁷ *Id.*, See also *Prosecutor v. Katanga*, Order Postponing the Hearing relating to the Challenge to Admissibility (Rule 58(2) of the Rules of Procedure and Evidence), ICC-01/04-01/07, 15 May 2009, paras. 2, 4; *Prosecutor v. Katanga*, Order to Convene a Hearing (rule 58(2) of the Rules of Procedure and Evidence), ICC-01/04-01/07, 22 May 2009, paras. 4 and 7. It should be noted that the Trial Chamber in *Katanga* postponed the public hearing when the authorities of the DRC were unable to attend the first scheduled public hearing, reasoning that the authorities of the DRC were “indispensable” to the public hearing. Further, Pre-Trial Chamber III in *Bemba* decided to postpone the date for the start of trial in order to conduct a public hearing concerning the admissibility case. The Chamber reasoned that “If there is to be a proper consideration by this Chamber of your application in relation to admissibility, we have got to properly consider it...If, even setting the tightest sensible deadline, the consideration of admissibility is going to go beyond 27 April, then the trial cannot start on that day.” (*Prosecutor v. Bemba*, Status Conference with Registry, OTP, Defence and OPCV, ICC-01/05-01/08, 8 March 2010, pg. 11, ln. 10 - pg. 12, ln. 2).

¹⁸ *Prosecutor v. Bemba*, Status Conference Hearing, ICC-01/05-01/08, 27 April 2010, pg. 69, ln. 3-10. See also. *Prosecutor v. Bemba*, Status Conference with Registry, OTP, Defence and OPCV, ICC-01/05-01/08, 8 March 2010, pg. 11, ln.9 - pg. 12, ln. 2.

21. As noted in the Government's Reply of 13 May 2011, the Commissioner of Police can answer any questions from the Chamber and the parties on the current investigation and the timetable for the investigation. This can most effectively be achieved in an oral hearing for the purpose of receiving and scrutinising such information. If necessary, any confidential or sensitive information can be heard *in camera*. The Chamber may also wish to hear from other Kenyan officials or authorities in such a hearing (see below on witness protection).

22. Were the Chamber to have concerns about the "genuineness" of the investigation and be minded to refuse the Admissibility Application, it could first hear from the Kenyan authorities responsible for the investigation directly in an oral hearing in which the concerns and questions of the Chamber can be put to the Government's representatives so that the Government has a fair opportunity to respond.

23. While receiving written updates to the Court on the progress of the investigation might be thought indispensable, conducting an oral hearing is, ultimately, the most effective and efficient way for the Chamber to assess the national investigation into the six suspects and the willingness of the Government to investigate and prosecute all serious crimes.¹⁹

(iii) National capacity and capability including witness protection

24. On 10 May 2011, the Prosecutor submitted 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'"²⁰ in which the Prosecutor raised serious allegations about the propriety of the Government of Kenya, including that:

- Kenya "has not established that there is an investigation ongoing in Kenya against the same individuals under investigation before the ICC"²¹;

¹⁹ *Prosecutor v. Bemba*, Status Conference Hearing, ICC-01/05-01/08, 27 April 2010, pg. 69, ln. 3-10. The Presiding Judge noted that the hearing to consider "some extremely focused and well-argued submissions [has] enabled us to address what is a relatively complicated issue extremely expeditiously and helpfully." (*Prosecutor v. Bemba*, Status Conference with Registry, OTP, Defence and OPCV, ICC-01/05-01/08, 8 March 2010, pg. 11, ln.9 - pg. 12, ln. 2.)

²⁰ Prosecutor's Reponse of 10 May 2011.

²¹ 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-01/09-02/11, 10 May 2011, para. 4 ("Prosecutor's Response of 10 May 2011").

- the Prosecutor “does not believe that the governmental structure presently can provide the necessary protection of witnesses”²²;
- any information “provided to the Kenyan authorities can be used to attack victims and witnesses”²³; and
- the Government has not shown how any evidence provided to it will be kept confidential and separate from the six suspects²⁴.

25. The Prosecutor’s allegations directly affect the Government’s Admissibility Application. The Government’s request for assistance from the Prosecutor was made to advance its national investigation. The Prosecutor’s reasons for refusing to assist the Government in its investigations (unsupported by any evidence) cast an (unwarranted) shadow over the Government’s ability to investigate and try the cases presently before the ICC. The Prosecutor’s refusal may also hamper the national investigation and deprive it of potentially useful evidence to which the Government has no access.

26. The Government will very shortly be requesting leave to reply to the Prosecutor’s refusal to cooperate and the unsubstantiated allegations on which it is based. An oral hearing will allow the Government to answer the Prosecutor’s allegations in full and permit the Chamber to be in the best position to assess the capacity and capability of the Government to retain jurisdiction over the six suspects and all other cases.²⁵

27. As noted in the Government’s Reply of 13 May 2011, the Government can, intends to and will put strict measures in place to protect any evidence made available by the Prosecutor that requires protection in order to ensure complete confidentiality for purposes of investigations and any trial(s) and to achieve full protection for the victims and witnesses. The Government has undertaken to do whatever is required including by use of its newly established, independent Witness Protection Agency (which was developed with extensive assistance and advice from the UN Office on

²² *Id.* at para. 17.

²³ *Id.* at para. 5.

²⁴ Prosecutor’s Response of 10 May 2011, paras. 22-3.

²⁵ The Chamber will also have in mind the recent filing of one of the suspects in which it is submitted that, *inter alia*, the Prosecutor has used its response to the Government’s request for assistance to make further submissions in response to the Admissibility Application without the leave of the Court (Observations on behalf of Henry Kiprono Kosgey to 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’”, 13 May 2011). Such matters could appropriately be explored at an oral hearing.

Drugs and Crime (UNODC) to provide an effective and robust witness protection program).

28. The Chamber must hear full representations in an oral hearing from the Government on how its witness protection program will work in practice. This is necessary both to resolve the Government's request for assistance from the Court and the Prosecutor, as well as to establish that Kenya has the ability to investigate and try the ICC cases with the necessary witness protection and other measures in place.

29. The Chamber can hear from the head of the Witness Protection Agency, Ms. Alice Ondieki, in an oral hearing to question her directly about these important matters. The Prosecutor should not be permitted to make generalised and unsupported allegations (sourced only with newspaper clippings and internet blogs) without such assertions being tested forensically before the Chamber. No adverse findings should be made against the Government without providing it with a fair opportunity to respond with oral evidence from those directly involved so that the Chamber has the benefit of first-hand evidence (and not merely the second and third hand accounts from news reports).²⁶

(iv) Complex and novel legal issues

30. The Government submits that an oral hearing would greatly assist the Chamber's consideration of the seminal and complex legal issues raised by the submissions in the Admissibility Application. As other Chambers have noted, an oral hearing is most "helpful" in dealing with the difficult and uncharted legal problems at the heart of admissibility issues.

31. An oral hearing would permit close examination of the Prosecutor's concept of "positive complementarity" and the ways in which it should be applied in practice to States like Kenya and other States in a consistent and universal manner.²⁷

²⁶ On this topic, the Government of Kenya could seek to call, and the Chamber might be assisted by, an expert witness assessment of the Kenya Witness programme in both absolute and comparative terms, the Kenyan programme having been based on the best practices from around the world and with the advice and input of international experts including from the ICC.

²⁷ See Statement of the Prosecutor to Diplomatic Corps, The Hague, The Netherlands, 12 February 2004 in which he cites to the Office of the Prosecutor's key strategic guideline to complementarity being "A positive approach to complementarity. Rather than competing with national systems for jurisdiction, we will encourage national proceedings wherever possible."

32. In particular, the “same person/same conduct” test which has not been considered in the context of an admissibility application by a State Party, or at all by the Appeals Chamber, is a novel legal issue, the resolution of which will have immediate ramifications for Kenya and longer term implications for other State Parties. The emerging jurisprudence on all such questions will undoubtedly shape the development of international law.

33. The written pleadings provide a necessary foundation for the consideration of these legal issues, but must be expanded upon in oral argument. It is through the exchange of oral argument, taking into account the questions of the Chamber, that the legal issues can be thoroughly explored. Very often the written pleadings do not fully address or answer the arguments in response. The strengths and weaknesses of legal arguments are revealed and best judged through the rigour of oral argument. The Government reiterates its request to have the opportunity to explain its position in an oral hearing on such important matters of national and sovereign interest.

D. Conclusion

34. For all of these reasons, the Government of Kenya respectfully requests that the Pre-Trial Chamber grant an oral hearing to consider the Admissibility Application and to hear the Government’s representations by its Counsel and officials in person and in public. This decision should be rendered as a separate decision before the final decision is delivered on the Admissibility Application itself.



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Dated 17th May 2011
London, United Kingdom