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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 on behalf of the Government of Kenya for Leave to Reply to the
Responses by the Prosecutor and the OPCV to the Government of Kenya's
Application for Leave to Appeal a Procedural Error in the Decision on
Admissibility**

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
Fatou Bensouda, Deputy Prosecutor

Counsel for Francis Kirimi Muthaura

Karim A. A. Khan QC and
Kennedy Ogeto

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and
Gillian Higgins

Counsel for Mohammed Hussein Ali

Evans Monari and Gregory Kehoe

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. Application for Leave to Reply

1. The Government of Kenya files this Application for Leave to Reply to the “Prosecution’s Response to the Government of Kenya’s Application for Leave to Appeal a Procedural Error in the Decision on Admissibility (ICC-01/09-02/11-105)” filed on 10 June 2011 (the “Prosecutor’s Response of 10 June 2011”) and the OPCV’s “Response to Government of Kenya’s Application for Leave to Appeal Alleged Procedural Error in Relation to Decision on Admissibility” filed on 10 June 2011 (the “OPCV Response of 10 June 2011”).
2. The Government of Kenya files this Application pursuant to Regulation 24(5) of the Regulations of the Court which states that “Participants may only reply to a response with the leave of the Chamber.”¹
3. The Prosecution submits in its Response that the failure to decide the Government’s Cooperation Request² does “not constitute an appealable issue within the meaning of Article 82(1)(d)” because it “was not a relevant consideration for the determination of ... whether this case is admissible before the Court.”³ The Prosecutor claims that the Government of Kenya “did not initially consider that resolution of its admissibility challenge was intertwined with a decision with respect to legal assistance”.⁴ The Prosecutor asserts that granting the Cooperation Request would have no impact on the Admissibility Decision because, he asserts, the Admissibility Application is determined on the basis of the facts as they exist at the time of the initiation of the admissibility challenge.⁵ The Prosecutor criticises the Government for filing its Cooperation Request “17 days” after its Admissibility Application. The Prosecutor argues that the Government does not provide “any arguments” on how the issue “impacts on the expeditious conduct of the proceedings” besides a potential “fresh challenge to admissibility on receiving the Prosecutor’s evidence.”⁶
4. The OPCV submits in its Response that the failure to decide on the Cooperation Request “had no causal impact on the Chamber’s determination of the admissibility

¹ Regulation 24(5).

² “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 (the “Cooperation Request”).

³ Prosecutor’s Response of 10 June 2011, paras. 4-8.

⁴ Prosecutor’s Response of 10 June 2011, para. 8.

⁵ Prosecutor’s Response of 10 June 2011, para. 9.

⁶ Prosecutor’s Response of 10 June 2011, para. 12.

request”⁷ and was “irrelevant to the Chamber’s reasoning” for denying the Government of Kenya’s Admissibility Application.⁸ The OPCV claims that Government of Kenya applies for leave to appeal a “hypothetical question [which is] not appropriate for judicial determination.”⁹

5. These Responses contain erroneous assertions about the Government of Kenya’s position, correction of which may mostly be evinced from the Government of Kenya’s original Application for Leave to Appeal of 6 June 2011. Nevertheless, the Government of Kenya requests that it be given the opportunity to identify and correct these errors in a Reply so that there is no room for uncertainty as to the Government’s actual and, it will argue, proper reasons for making its Application for Leave to Appeal.
6. Setting out the grounds for being afforded leave to reply will, almost unavoidably, recite the very paragraphs that would appear in a Reply if leave is granted. In these circumstances the Government of Kenya can make clear that the grant of leave will lead to little, if any, additional filing beyond this Application, which might (should the Chamber permit) itself stand as the Reply.
7. The Government of Kenya sets out below five points to justify the grant of leave and to be taken into account if leave is granted.

B. Submissions to justify the grant of leave and/or submissions in Reply

8. *First*, the Government of Kenya always regarded any assistance and cooperation from the Prosecutor as an integral part of its admissibility challenge. The principle of complementarity takes effect both in national initiatives *and* in support from the ICC and other States Parties for national investigations and capacity building. The Government emphasised this point in its Admissibility Application.¹⁰ The Prosecutor

⁷ OPCV’s Response of 10 June 2011, para. 7.

⁸ OPCV’s Response of 10 June 2011, para. 8.

⁹ OPCV’s Response of 10 June 2011, para. 12.

¹⁰ “Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute”, ICC-01/09-01/11-19, 31 March 2011, para. 17 (the “Admissibility Application”). The Government’s Admissibility Application stated at paragraph 17 that “The Government hopes the Prosecutor may share the outcome of his investigations to date with the appropriate Kenyan authorities in order to assist the Kenyan investigations. The Government will be enthusiastic in exploring ways in which the Prosecution could continue to co-operate with the Kenyan authorities.”

will also recall that representatives of the Government of Kenya met with him at the time of the initial appearances of the Suspects on 7 and 8 April 2011 in order specifically to request his assistance in providing evidence to the Government of Kenya in relation to the six Suspects in light of the Admissibility Application. The Prosecutor refused to provide any evidence or assistance to the Government of Kenya in respect of the six Suspects, and claimed that these cases were for him to prosecute. The Government was thus compelled then, and only then, to file a formal request for assistance.

9. Second, the Prosecutor is wrong to assert that the time for considering the facts relevant to admissibility is at the *initiation* of the admissibility challenge.¹¹ The Prosecutor's reliance on paragraph 56 of the *Katanga* Judgment is erroneous. It states that "the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge ... [T]he investigative and prosecutorial activities of States having jurisdiction ... may change over time ... [T]he Statute assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory".¹² The *proceedings* concerning the admissibility challenge were on-going at the time the Government of Kenya filed its Cooperation Request. The reason for the Request was to obtain a decision while the admissibility proceedings were underway (and have been ever since) so that any materials received as a result of the Cooperation Request could be relied on as part of the *facts* relevant to the admissibility proceedings. It is an entirely reasonable and sensible approach for the Government of Kenya to ask for assistance while the admissibility proceedings are on-going so that any evidence received as a result of the Cooperation Request may be taken into account as material on which the Government of Kenya's investigators can work, and be seen to be working,¹³ when admissibility is considered.

¹¹ Prosecutor's Response of 10 June 2011, para. 9.

¹² *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 OA 8, 25 September 2009, para. 56.

¹³ The sense of this may be further tested by contemplation of a hypothetical devious State challenging admissibility on complementarity grounds but *not* wanting to be embarrassed by evidence believed to be in the Prosecutor's possession that might be adverse to leading figures in the State's government apparatus. Could the State legitimately say that because it had already started its investigation, admissibility had to be tested according to the evidence in its possession just at the moment when the application was made, thus to deny itself the risk or prospect of having to deal with the evidence adverse to its leaders? Kenya, by contrast with this hypothetical case, has sought out evidence adverse to its leaders from the ICC Prosecutor.

10. The Government of Kenya never proposed that a decision on its Cooperation Request should be rendered at some future speculative date after the admissibility proceedings have been completed. Instead, the Government of Kenya requested a decision while the proceedings were still underway and before a decision was rendered on the Admissibility Application.¹⁴ A decision on the Cooperation Request has yet to be delivered. It has been and remains the Government of Kenya's submission that a decision on the Cooperation Request should be made before the admissibility proceedings are finally determined because such a decision may have a direct impact on the facts that are relevant to its admissibility challenge.
11. Third, the Government of Kenya has never said that the Cooperation Request must be determined in order to "trigger" its national investigation. It is the Government of Kenya's submission that any evidence received from the granting of the Cooperation Request could enhance its existing national investigation that is currently being undertaken. The fact that the Chamber has not rendered a decision on the Cooperation Requests therefore has an impact on the fairness of the proceedings as it deprives the Government of potentially relevant evidence in its current national investigation to which it may otherwise not have access.
12. Furthermore, the Government of Kenya has never "implicitly conceded" that the Cooperation Request did not need to be resolved before the Admissibility Application. The Government made it plain in its Cooperation Request that it sought this request to be "resolved at the earliest opportunity ... certainly ahead of the time when any decision on its Application under Article 19 is determined".¹⁵ The Government of Kenya did not change this request in any of its subsequent filings.
13. Fourth, the Government of Kenya does provide arguments to establish that leave to appeal should be granted on the basis that the failure to decide the Cooperation Request does significantly affect the expeditious conduct of the proceedings and that an immediate resolution by the Appeals Chamber may materially advance the proceedings. Were the Appeals Chamber to find that the Cooperation Request should be decided while the admissibility proceedings were underway, it could lead to

¹⁴ "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, para. 7.

¹⁵ "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, para. 7.

evidence in the possession of the Prosecutor being provided to the Government of Kenya. This could have a significant impact on the admissibility challenge itself before it is finally determined. However, if the Cooperation Request is left to be decided after the present admissibility challenge has been finally determined by the Appeals Chamber, and if that determination is adverse to the Government of Kenya, it could result in the challenge having to be reconsidered by the Court on a second occasion. It would thus materially advance the proceedings and prevent delay to have the Cooperation Request determined immediately so that any consequences for the present admissibility challenge could be taken into account.

14. There is another reason why the issue should be decided by the Appeals Chamber to advance the proceedings. The Prosecutor has refused to assist the Government on the basis of unsubstantiated and serious allegations of the Government being involved in witness intimidation. (These same allegations were repeated in the Prosecutor's submissions on the venue for the confirmation hearings that were filed on 13 June 2011 (once again, without any supporting evidence)).¹⁶ The Government has asked to have, but so far not been allowed, the opportunity to reply to these allegations in respect of the Cooperation Request.¹⁷ Such a response, made within and to be considered for purposes of the admissibility arguments, could have had a bearing on the Pre-Trial Chamber's consideration of the Admissibility Application. Allegations of witness intimidation will clearly be central to the admissibility proceedings before the Appeals Chamber. A full consideration of these allegations as part of the Cooperation Request and a decision on the Request taking such matters into account was thus essential for the present admissibility proceedings.

15. Fifth, the OPCV's assertion that the Government of Kenya's Application for Leave to Appeal is a "hypothetical question ... not appropriate for judicial determination" is misconceived.¹⁸ The Pre-Trial Chamber has rendered its decision on the question of the relationship between the Admissibility Application and the Cooperation Request, and should it take the view that the issue ought to be considered by the Appeals Chamber because the requirements of Article 82(1)(d) have been satisfied, it can grant

¹⁶ "Prosecution's Submissions Regarding Proposal to Conduct the confirmation Hearing in Kenya", ICC-01/09-01/11 and ICC-01/09-02/11, 13 June 2011, paras. 2-10.

¹⁷ "Application on behalf of the Government of Kenya for leave to reply to responses, filed on 28 April 2011, to Application challenging admissibility in light of the responses as filed and of no decision being rendered in respect of the Government of Kenya's filing of 11 April 2011 requesting a direction on its right to reply", ICC-01/09-01/11 and ICC-01/09-02/11, 2 May 2011.

¹⁸ OPCV's Response of 10 June 2011, para. 12.

leave to appeal. This decision is of course - the Government of Kenya will argue - subject to the Appeals Chamber's consideration of the same issue and its determination. There is nothing in the Statute preventing the Government from applying for leave on this issue and simultaneously pursuing the matter directly with the Appeals Chamber.



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

Dated 17th June 2011
London, United Kingdom