



Original: English

No.: ICC-01/09-02/11

Date: 4 July 2011

IN THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public Document

**Filing of Updated Investigation Report by the Government of Kenya in the
Appeal against the Pre-Trial Chamber's 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

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Unrepresented Victims

**Unrepresented Applicants for
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Other

Updated report on national investigation into six ICC suspects

1. In the Government of Kenya's Document in support of its Appeal, filed on 20 June 2011, the Government indicated that as the investigation into the six ICC suspects was ongoing, further reports would be made available during the appellate proceedings in order that the Appeals Chamber and the parties would be appraised of the most up-to-date information on the investigation. The Government of Kenya accordingly submits an updated report on its investigation into the six ICC suspects dated 1 July 2011. It is attached hereto as Annex 1.
2. The Director of Criminal Investigations is providing bi-monthly updates on the investigation as was required by the Attorney-General in his letter of 14 April 2011 (Annex 1 to the Admissibility Application of 31 March 2011). The attached Report is addressed to the newly appointed Director of Public Prosecutions (DPP) who was confirmed by Parliament on 20 June 2011¹. Under the new Constitution the DPP is responsible for directing all national prosecutions and is an authority independent of the Government *and* of the Attorney-General. The new DPP, together with the Commissioner of Police, are responsible for taking forward the national investigation and any consequential prosecution of the six ICC suspects.
3. The Appeals Chamber is respectfully requested to accept this Report as further confirmation that the national investigation into the six ICC suspects is ongoing and progressing expeditiously. The Appeals Chamber has acknowledged that national investigations and prosecutions may develop and change over time, and that therefore the determination of admissibility is an ongoing process which must be decided on the facts as they exist at the time of the admissibility proceedings.² The Report of 1 July 2011 provides to the Court the facts as they *currently* exist about the national investigation.³ The Report also sets out the next steps that will be taken in the

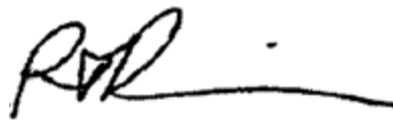
¹ See Admissibility Application of 31 March 2011, paras 67-78, in which the Government of Kenya explained how under the new Constitution and the judicial reforms being implemented, the new DPP's office would be established (separated from the Attorney-General's office) to act as an independent prosecuting authority.

² *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-01/04-01/07-1497, 25 September 2009, para. 56, and *Prosecutor v. Kony et al.*, Decision on the admissibility of the case under article 91(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, paras. 25-29.

³ It would be illogical and a needless waste of court time and resources if the Government of Kenya would be required to file a second admissibility application in order to submit its latest investigative report to the Court. The latest Report is directly relevant to the present appeal in that it relates to the central issue that is on appeal

investigation, which will be reported on in the next Updated Report. The attached Report is provided in sufficient time for the parties to be able to respond to it in the present appellate proceedings – the Prosecutor and the Suspects have until 11 July 2011 to file their responses, and the OPCV until 18 July 2011.

4. The Government of Kenya respectfully submits that the Report should be accepted as further unequivocal evidence of the Government of Kenya's intentions and of its conduct in currently investigating the six ICC suspects.⁴ When determining admissibility a State's intent can be established by "explicit statements" of officials of the State.⁵ Allegations that may question the genuine nature of the national proceedings can only be made on the basis of concrete evidence "as opposed to speculation".⁶ The Report provides further concrete support for the Government of Kenya's submission that throughout these admissibility proceedings the six ICC suspects *have been and are being* investigated by Kenya, and that the ICC cases are thus inadmissible under Articles 17 and 19 of the Statute.



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

Dated 4th July 2011

London, United Kingdom

i.e. whether there is a national investigation underway. The Report clearly demonstrates "activity" in contrast to the Pre-Trial Chamber's finding in the impugned decision of "inactivity".

⁴ See also Government Reply of 13 May 2011, para. 76.

⁵ *Prosecutor v. Katanga*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07, 16 June 2009, para. 92; *Prosecutor v. Bemba*, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08, 24 June 2010, para. 246.

⁶ *Prosecutor v. Bemba*, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08, 24 June 2010, para. 235.