



Original: English

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

Date: 15 July 2011

IN THE APPEALS CHAMBER

Before: Judge David Daniel 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
THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI
KENYATTA AND MOHAMMED HUSSEIN ALI

PUBLIC

**Defence observations on “Filing of Updated Investigation Report by the
Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on
Admissibility”**

Source: Defence of General Mohammed Hussein Ali

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

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, John Philpot, Greg Kehoe
and Gershom Otachi Bw'omanwa

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Sir Geoffrey Nice QC
Rodney Dixon

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations

Other

1. The Defence of Mohammed Hussein Ali files these submissions in response to “Order on the filing of observations in relation to the “Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility””¹ wherein the Appeals Chamber requested the Defence Teams “to file any observations they may have as to whether the Updated Investigation Report should be accepted or should be dismissed in *limine*. ”²
2. On 6 June 2011, the Government of the Republic of Kenya (the “GoK”) submitted its Appeal³ against Pre-Trial Chamber II’s “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute.”⁴
3. On 4 July 2011, the GoK submitted the “Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility”⁵ (the “Filing of Updated Investigation Report.” In its filing, the GoK submitted that “[t]he 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.”⁶
4. On 12 July 2011, the parties: the Prosecutor and the Defence of Ali filed their responses to the GoK Appeal.
5. On 14 July 2011, the Appeals Chamber requested the Defence Teams to file their observations in relation to the GoK filing of Updated Investigation Report.⁷

¹ ICC-01/09-02/11-171

² *Id*, page. 5.

³ Appeal of the Government of Kenya against the ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, 6 June 2011.

⁴ ICC-01/09-02/11-96

⁵ ICC-01/09-02/11-153.

⁶ *Id*, para. 3.

⁷ *Supra*, note 1.

6. The Defence, while reserving its right to file its own application endorses the position of the Government of the Republic of Kenya and makes no further submissions in regard to the same.

Respectfully submitted,



Evans Monari and Gershom Otachi Bw'omanwa
On behalf of Mohammed Hussein Ali

Dated this 15th day of July, 2011

At Nairobi, Kenya