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

Date: 19 July 2011

IN THE APPEALS CHAMBER

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

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
 "Prosecution's response to the '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'"**

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 ‘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’” filed on 12 July 2011 (the “Prosecutor’s Response of 12 July 2011”).
2. The Government of Kenya files this Application pursuant to Regulation 24(5) of the Regulations of the Court which provides that “Participants may only reply to a response with the leave of the Chamber.”
3. The Government of Kenya submits that the Prosecutor’s Response of 12 July 2011 contains new and erroneous assertions of law and fact which the Government of Kenya should have a fair opportunity to correct. These errors, as explained below, relate to matters that are central to the appeal. They are complex and require detailed attention to do justice to the merits of the legal and factual issues involved. They have not and could not have been addressed, or fully addressed, in the Government of Kenya’s Document in support of its Appeal.
4. The Prosecution did not oppose the Government of Kenya’s right to reply to its response before the Pre-Trial Chamber. It submitted that “the Prosecution notes that 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.”¹
5. The Government of Kenya submits that the Appeals Chamber should receive the Government of Kenya’s submissions in reply before making any determination of the appeal.
6. The Government of Kenya respectfully requests that it is permitted to file its Reply by Tuesday 2 August 2011, or by such date as ordered by the Appeals Chamber.

¹ Prosecution’s response to the Government of Kenya’s request to reply, 21 April 2011, para. 3.

7. It must be taken into account that the Prosecution and the Government of Kenya are due to file their Responses to the observations of the OPCV by Tuesday 26 July 2011 in accordance with the Appeals Chamber's Order of 13 June 2011.² The Government of Kenya requests that pursuant to Regulations 34 and 35 it be given a further week thereafter until Tuesday, 2 August 2011 to file its Reply to the Prosecutor's Response of 12 July 2011 for the following reasons:

- a. As set out below, the legal and factual issues arising from the Prosecution's Response are numerous, often intricate, and concern fundamental legal, factual and procedural questions. They cover new ground in an appeal which is the first of its kind, and which holds great importance to the Government of Kenya as a State Party of the ICC.
- b. It will provide the Government of Kenya with an opportunity to respond to any matters raised by the Prosecution in its response to the observations of the OPCV that will be filed on 26 July 2011, which are likely to overlap directly with, and may elaborate upon, the arguments the Prosecution has raised in its Response of 12 July 2011.
- c. As explained below, it will also provide the Government of Kenya with the opportunity to provide the Appeals Chamber with the most up-to-date information on the investigation into the six Suspects before the Appeals Chamber renders its decision.

B. Procedural History

8. On 6 June 2011, the Government of Kenya filed the "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' (the "Appeal Notice of 6 June 2011") in which the Government of Kenya submitted that the Pre-Trial Chamber erred in procedure, in fact and in law in its Admissibility Decision of 30 May 2011.

² Directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence, 13 June 2011 (hereinafter the "Appeals Chamber's Decision of 13 June 2011"). By this order the OPCV were directed to file their observations within 7 days of the Responses of the parties i.e. by 19 July 2011, and the Prosecution and the Government were given 7 days thereafter to file any response i.e. by 26 July 2011.

9. On 13 June 2011, the Appeals Chamber decided that the victims, represented by the OPCV, could submit observations in respect of the Appeal to be filed seven days after notification of the Prosecution and Defence Responses to the Appeal. The Appeals Chamber directed that the parties, including the Government of Kenya, could file responses to these observations within seven days.³
10. On 20 June 2011, the Government of Kenya filed the “Document in Support of the ‘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’ (the “Document in Support of Appeal of 20 June 2011”).
11. The Prosecution filed its Response to the Appeal on 12 July 2011. The following suspects filed their responses on 12 July 2011: Mr. Ali, Mr. Ruto and Mr. Sang, and Mr. Kosgey.
12. On 14 July 2011, the Appeals Chamber directed the suspects to file “any observations as to whether the Appeals Chamber should accept or should dismiss in limine” the updated investigation Report of 1 July 2011 by 19 July 2011.⁴ On 15 July 2011, the Defence for Mr. Ali submitted its observation in support of the Appeals Chamber accepting the Report and on 19 July 2011 the Defence for Mr. Ruto and Mr. Sang, as well as Mr. Kosgey filed observations supporting the acceptance of the Report.

C. Reasons for granting leave to reply

Relevant time for determination of admissibility challenge

13. The Prosecution’s main submission in its Response is that the relevant time for considering whether the case is being investigated is when the Government concerned *files* its admissibility challenge.⁵ This argument pervades the entire Prosecution’s Response. The Prosecution would have the evidence about the investigation in which the admissibility decision must be based, frozen in time on 31 March 2011.

³ Appeal Chamber’s Decision of 13 June 2011.

⁴ 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”, 14 July 2011.

⁵ Prosecutor’s Response of 12 July 2011, paras. 27, 28, 36-51.

14. Such a finding was *not* made by the Pre-Trial Chamber. The Chamber considered all evidence filed up until the Reply of the Government of Kenya i.e. beyond the date on which the Government's Admissibility Application was filed.⁶
15. The Prosecution did not advance the argument before the Pre-Trial Chamber that it now asserts before the Appeals Chamber. Indeed, the Prosecution in its response to the Government of Kenya's application to reply in the admissibility proceedings before the Pre-Trial Chamber did not oppose the Government's application on the basis that the reply "*could update the Chamber on the status of the investigation since the time the original admissibility application was filed*"⁷. The Prosecution has completely changed its position in its submissions before the Appeals Chamber.
16. The Prosecution also cited with approval before the Pre-Trial Chamber the finding of the Appeals Chamber that "Article 17(1)(a) of the Statute covers a scenario where, at the time of the Court's *determination* of the admissibility of the case, investigation or prosecution is taking place in a State having jurisdiction"⁸ (emphasis added).
17. The argument now advanced by the Prosecution is a new argument put forward by the Prosecution in the proceedings to which the Government of Kenya should be entitled to reply.
18. In any event, the Government of Kenya should be permitted to reply to the Prosecutor's argument as it is critical to the outcome of the appeal. It is vital for the Appeals Chamber to hear the full arguments on this issue.
19. If the Prosecution are right that the Appeals Chamber can simply ignore all investigative steps that have been taken since the Government of Kenya filed its Admissibility Application, it could mean that the Prosecution is inviting a second Admissibility Application. Such an approach would not only be unnecessary, but is bad practice. If concrete evidence of a national investigation is now before the Appeals Chamber (as the Government of Kenya contends it is), what possible reason could there be for not considering it on a technical ground that serves no purpose, let

⁶ See para. 70 (01/09-01/11) and para. 66 (01/09-02/11): "*up until the party filed its Reply*".

⁷ Prosecution's response to the Government of Kenya's request to reply, 21 April 2011, para. 3.

⁸ Prosecution Response of 28 April 2011, para. 17, citing *Prosecutor v. Katanga and Ngudjolo*, 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 OA 8, 25 September 2009, para. 75.

alone the ends of the proper and efficient administration of justice. The whole point of an inquiry into complementarity *is* to determine whether the national jurisdiction is in fact investigating the case before the ICC. The Prosecution would prefer that the issue is not confronted by the Appeals Chamber and is avoided on technical grounds.

20. The Appeals Chamber is invited to consider the most up-to-date evidence of the national investigation into the six Suspects. The Prosecution would rather that this evidence is ignored. The issue before the ICC in this appeal is one of the complementarity. The Government of Kenya, as a prominent and responsible State Party, has asked the ICC to apply this cornerstone principle to its unfolding domestic investigation into the six Suspects presently before the ICC. The Prosecution is seeking to obscure what is the real issue by suggesting that the issue is historic not contemporary. This approach should be rejected. The Appeals Chamber should determine the issue of admissibility on the basis of all of the evidence before it. To this end the Government of Kenya requests that it is granted leave to reply to the Prosecution's erroneous arguments.

Definition and evidence of “an investigation”

21. The next and related question that arises is what constitutes “an investigation” and what evidence must be submitted before the ICC in respect of the national investigation in question.

22. The Prosecution has argued that the investigation must be “concrete, meaningful and effective”.⁹ It has not cited any jurisprudence from the ICC on this issue. It has referred to case law from the European Court of Human Rights¹⁰ which the Government of Kenya submits is not applicable to the interpretation of Articles 17 and 19 of the ICC Statute as it concerns the obligations of States under the European Convention on Human Rights to investigate human rights violations under domestic law. The Government of Kenya seeks leave to make its submissions on this point as it is vital that any definition adopted by the Appeals Chamber should not require that the national investigation must be completed. The Statute and Rules do not so require and

⁹ Prosecutor's Response of 12 July 2011, paras. 2, 28.

¹⁰ Prosecutor's Response of 12 July 2011, para. 28, fn 57.

there is no ICC case law that has decided that the national investigation must be concluded before a case can be declared inadmissible.

23. The Government of Kenya, of course, does not dispute that the investigation of the case for the purposes of Articles 17 and 19 of the ICC Statute must be genuine. It submits that its investigation into the six Suspects is an effective investigation supported by concrete evidence. The Prosecution has not argued that the Government of Kenya is “unwilling” to investigate the six Suspects, only that the Government of Kenya has failed to demonstrate that it is investigating any of the six Suspects.¹¹ The Government of Kenya seeks leave to reply to the Prosecution’s erroneous arguments that no investigation is underway in accordance with the test that it has advanced.

24. Furthermore, the Prosecution questions the *bone fides* of the information that has been provided by the Government of Kenya. It wrongly suggests that the Government of Kenya should have made all of its case files available to the ICC and should have submitted a statement from the Commissioner of Police.¹² The Prosecution does not assert that this information should have been provided as *additional* information, but that the failure to submit it shows that no investigation is going on at all. This argument is misconceived, and reveals a determination not to yield jurisdiction over the present cases at any cost. In the Government of Kenya’s submission it should fairly be given the chance to reply to the position adopted by the Prosecution.

Other reasons

25. In addition to these issues, there are a number of other erroneous assertions on important issues made by the Prosecution to which the Government of Kenya should have the opportunity to reply:

- a. The Prosecution asserts that the Government of Kenya’s admissibility challenge is based on “future developments” in its investigation.¹³ The Government of Kenya should have an opportunity to reply to this misleading allegation. The national investigation is plainly not speculative – the

¹¹ Prosecutor’s Response of 12 July 2011, paras. 4, 37, 40-51, 53, 57, 84.

¹² Prosecutor’s Response of 12 July 2011, paras. 42, 44.

¹³ Prosecutor’s Response of 12 July 2011, para. 30.

Government of Kenya could highlight in its Reply what are the latest concrete steps that have been undertaken.

- b. The Prosecution claims that the Government of Kenya submitted its updated investigation report of 1 July 2011 without applying pursuant to Regulation 62 to the Appeals Chamber to present additional evidence.¹⁴ This Regulation relates to appeals by the Prosecution or Defence from a conviction or acquittal following a trial – it specifically refers to “the Trial Chamber” and makes no reference to interlocutory or other appeals from the Pre-Trial Chamber. The Government of Kenya seeks leave to reply on the applicability of this Regulation to the present proceedings.
- c. The Prosecution also claims that this report “lacks probative value”.¹⁵ The Government of Kenya asks that it is permitted to reply to this unfounded allegation before any decision is rendered on the admissibility of this report.
- d. The Prosecution misquotes and misinterprets the investigation reports, materials and correspondence relied upon by the Government of Kenya¹⁶, which the Government of Kenya should be given an opportunity to correct. The Prosecution questions the validity of the instructions and reports given by the Attorney-General, the Commissioner of Police and the Director of Criminal Investigations with no basis at all to suggest that they are not genuine and authentic.
- e. The Prosecution argues that the Pre-Trial Chamber did not abuse its discretion in any of the procedural decisions that it made. The Government of Kenya wishes to reply to these arguments as they are wrongly premised on the suggestion that the Government of Kenya sought “to extend the admissibility proceedings over time, seemingly in the hope that at some point in the future there would be an actual investigation”.¹⁷

¹⁴ Prosecutor’s Response of 12 July 2011, para. 35.

¹⁵ Prosecutor’s Response of 12 July 2011, para. 35.

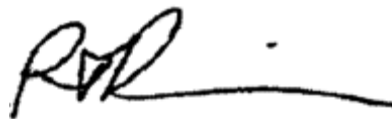
¹⁶ Prosecutor’s Response of 12 July 2011, paras 46-59.

¹⁷ Prosecutor’s Response of 12 July 2011, para. 62.

- f. As to the applicable legal test for the determination of admissibility, the Prosecution sets out its argument in full in respect of the “same person same conduct” test. The Prosecution refers to various sources it claims are authoritative, including the drafting history of the ICC Statute.¹⁸ The Government of Kenya requests leave to reply to these legal submissions and to address the sources now relied on by the Prosecution. The Prosecution does not address the main point advanced by the Government of Kenya that the complementarity test should not penalise a *bone fide* State that is deprived of the evidence in the possession of the ICC Prosecutor.

D. Conclusion

26. For the reasons outlined above, the Government of Kenya respectfully requests that the Appeals Chamber grant leave to the Government of Kenya to reply to the new and erroneous arguments advanced by the Prosecution in its Response.



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

Dated 19th July 2011
London, United Kingdom

¹⁸ Prosecutor’s Response of 12 July 2011, paras 72-103.