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No.: **ICC-01/09OA**

Date: **20 July 2011**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

Public Document

Prosecution's Response to the "Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence'" (ICC-01/09-70)

Source: Office of the Prosecutor

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Introduction

1. The Government of Kenya (“GoK”) has noticed its appeal from a decision of the Pre-Trial Chamber denying its request for cooperation and legal assistance. It thus takes the position that the decision is automatically appealable under Article 82(1)(a), without the need for an order of the Pre-Trial Chamber authorizing appeal.
2. The Prosecution disagrees that the GoK has an automatic right to appeal the decision on cooperation. Article 82(1)(a), which is the theoretical basis for the GoK Notice, authorizes appeal from “a decision with respect to jurisdiction or admissibility”. The fact that the cooperation and assistance was sought in connection with an alleged national investigation that underlies the separate admissibility challenge does not render the denial of the cooperation request “a decision with respect to jurisdiction or admissibility”. Accordingly, the Prosecution submits that the notice of appeal should be dismissed.

Background

3. On 31 March 2011, the Government of Kenya (“GoK”) filed its challenge to the admissibility of the case against William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang. On the same day the GoK filed its challenge to the admissibility of the case against Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (“Admissibility Challenge”).¹
4. Three weeks later, on 21 April 2011, the GoK filed a request for cooperation and assistance under Article 93(10) and Rule 194 in the record of the situation (“Cooperation Request”),² seeking “all statements, documents, or other types of evidence” obtained in the course of the Prosecutor’s investigations.³

¹ ICC-01/09-01/11-19 and ICC-01/09-02/11-26.

² ICC-01/09-58.

³ Cooperation Request, p.3.

5. On 10 May 2011, the prosecution filed its response to the Cooperation Request, in both cases with a corrigendum to this Response.⁴
6. On 18 of May, the GoK filed its “Application on behalf of the Government of Kenya for leave to reply to the Prosecutor’s Response of 10 May 2011 and Corrigendum of 11 May 2011 to the Cooperation Request”⁵.
7. On 30 May 2011, the Pre-Trial Chamber issued the decision on the Admissibility Challenge (“Admissibility Decision”),⁶ concluding that two cases arising out of the investigation into the situation in Kenya are admissible. As a preliminary matter, the Pre-Trial Chamber found that the Cooperation Request was unrelated to the Admissibility Challenge and concluded that it should “rule on the merits of the Cooperation Request in a separate decision to be issued subsequently”.⁷
8. On 31 May 2011, the GoK requested the Chamber to rule on the Request for Leave to Reply before the Chamber ruled on the Cooperation Request.⁸
9. On 6 June 2011, the GoK filed an appeal against the Admissibility.⁹ On 20 June 2011, the GoK filed its Document in Support of the Appeal,¹⁰ arguing, inter alia, that the Chamber erred when it refused to decide on the Cooperation Request prior to ruling on the merits of the Application by holding that there was no link between the Cooperation Request and the Application.¹¹
10. On 29 June 2011, the Chamber issued its “Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to

⁴ Pursuant to Decision ICC-01/09-63, documents ICC-01/09-02/11-83/83-Corr and ICC-01/09-02/11-86/86-Corr were transferred to the record of the situation. See ICC-01/09-64-Corr and ICC-01/09-65-Corr.

⁵ ICC-01/09-61

⁶ ICC-01/09-01/11-101, ICC-01/09-02/11-96.

⁷ Decision, paras.32-35.

⁸ ICC-01/09-62.

⁹ ICC-01/09-01/11-109, ICC-01/09-02/11-104.

¹⁰ ICC-01/09-01/11-135, ICC-01/09-02/11-130

¹¹ ICC-01/09-01/11-135, para.73; ICC-01/09-02/11-130, para. 73

Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence” (“Decision”).¹²

11. On 4 July 2011, the GoK filed its Appeal (“Notice of Appeal”).¹³ The GoK claims that the Pre-Trial Chamber II committed factual, procedural and legal errors¹⁴ and seeks reversal by the Appeals Chamber. It also asked that the appeal from the denial of its request for assistance be joined with its appeal from the denial of its admissibility challenge.¹⁵
12. On the same day the GoK also filed an application for leave to appeal the Decision (“Application”).¹⁶ In this latter document, it informed the Pre-Trial Chamber that its “primary submission is that no leave is required to have its appeal heard by the Appeals Chamber” and that the Application is filed “in the event that the Appeals Chamber does not accept this submission”.¹⁷ On 8 July, the Prosecution filed its Response to the Application for Leave to Appeal.¹⁸ That Application is still pending before the Pre-Trial Chamber.
13. On 12 July, the Appeals Chamber filed its “Directions of the Appeals Chamber”,¹⁹ directing the Prosecution to respond to the submissions contained in paragraphs 6 to 10 of the Notice of Appeal.
14. The Prosecution hereby files its submissions regarding the provisions of Article 82(1)(a).

¹² [ICC-01/09-63](#)

¹³ [ICC-01/09-70](#) (“Notice of Appeal”)

¹⁴ Notice of Appeal, para. 2

¹⁵ See, for instance, ICC-01/09-70, paras. 23-28.

¹⁶ [ICC-01/09-71](#) (“Application”)

¹⁷ Application, para. 4

¹⁸ [ICC-01/09-73](#)

¹⁹ [ICC-01/09-74](#)

Submissions

15. The Prosecution submits that the Decision is not one for which an appeal lies as a matter of right. The GoK can only bring the underlying issues before the Appeals Chamber through the avenue provided for in Article 82(1)(d). It has sought authorization in an Application that remains pending. The purported appeal as of right, however, is inadmissible and should be dismissed *in limine*.

16. Article 82(1)(a) states that parties may appeal “[a] decision with respect to jurisdiction or admissibility”.²⁰ The Appeals Chamber has clarified that a party may raise on appeal procedural errors allegedly vitiating a decision on admissibility.²¹ The GoK has done so in its appeal against the Pre-Trial Chamber’s 30 May 2011 ruling on admissibility, arguing *inter alia* that the Pre-Trial Chamber made a procedural error by refusing to decide on the GoK’s request for assistance before making a determination on admissibility.²²

17. The ruling that the GoK is now seeking to challenge, in contrast, is *not* a decision on admissibility: it is a separate ruling pertaining to a request for cooperation made by the GoK. Moreover, the Decision was issued in the Situation in the Republic of Kenya, a fact that further reflects that the request for cooperation is independent of the admissibility challenges in the two cases arising out of this situation. The fact that the GoK considers as part of its admissibility appeal that its subsequent request for assistance was linked to its admissibility challenge cannot modify the nature of the Decision and turn it into a ruling on admissibility.

²⁰ The Prosecution has taken the position in its response to the document in support of the appeal filed by the GoK that states who brought a challenge under Article 19 of the Statute have standing to appeal decisions on admissibility (see ICC-01/09-02/11-130, fn. 53 and ICC-01/09-02/11-168, fn. 53).

²¹ See ICC-02/04-01/05 OA 3, paras. 46-47.

²² See ICC-01/09-01/11-135, paras. 70-78; ICC-01/09-02/11-130, paras. 70-78.

18. Since the appeal is inadmissible, it follows that the GoK's request that it be considered jointly with the appeal against the admissibility rulings in the Kenya cases²³ must also be rejected.

19. The Prosecution finally notes that a number of the arguments that the GoK intends to advance in the instant appeal appear to be a variation of those which the GoK has already submitted before the Appeals Chamber in its document in support of the appeal.²⁴ In addition and as already advanced, the GoK is also seeking leave to appeal the Decision under Article 82 (1) (d), and a ruling is pending on the matter. Accordingly, the GoK has had ample recourse to advance its position and cannot validly claim any prejudice arising out of a rejection of this appeal.

Conclusion

20. For the above referred reasons, the Prosecution requests that the appeal be held inadmissible and rejected *in limine* by the Appeals Chamber.



Luis Moreno-Ocampo, Prosecutor

Dated this 20th day of June, 2011

At The Hague, The Netherlands

²³ See ICC-01/09-70, para. 10.

²⁴ See, for instance, ICC-01/09-70, paras. 23-28.