



Original: **English**

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

Date: **16 September 2011**

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

**Request by the Government of Kenya in respect of the Confirmation of Charges
Proceedings**

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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Fatou Bensouda, Deputy Prosecutor

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Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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States Representatives

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REGISTRY

Registrar

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. Introduction

1. The Government of Kenya files this request to be permitted to have legal representation in the courtroom during the confirmation of charges proceedings in the present case.

B. Reasons for request

2. The Government of Kenya submits that its request should be granted for the following reasons:

(i) Requests for Assistance and Cooperation from the ICC are outstanding

3. The Pre-Trial Chamber refused to allow the Government of Kenya to be present in the courtroom in the confirmation hearing of the first Kenya case (Case ICC-01/09-01/11).¹ The Pre-Trial Chamber reasoned that pursuant to Rule 122(1) it could “determine how the hearing is to be conducted [...]”² and it held “that the Government of Kenya has no procedural standing before the Chamber for the purpose of the confirmation of charges hearing”³ because “no issue concerning the Government of Kenya ... is currently pending before the bench.”⁴
4. On the contrary, the Government of Kenya’s Request for Assistance of 21 April 2011 is still pending before the Pre-Trial Chamber. Although the Chamber rejected this request, the Chamber has not yet ruled on the Government of Kenya’s Application for Leave to Appeal the Request for Assistance Decision which was filed on 4 July 2011.⁵ In the Government’s submission there are proper grounds for leave to be granted, and in the event that the application was successful the matter would be considered by the Appeals Chamber.

¹ Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings, ICC-01/09-01/11-310, 1 September 2011.

² Decision on the ‘Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings’, ICC-01/09-01/11-313, 1 September 2011, para. 7.

³ Decision on the ‘Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings’, ICC-01/09-01/11-313, 1 September 2011, para. 8.

⁴ Decision on the ‘Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings’, ICC-01/09-01/11-313, 1 September 2011, para. 8.

⁵ Government of Kenya’s Application for Leave to Appeal 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-01/09-71, 4 July 2011.

5. As the Pre-Trial Chamber is aware, the Government of Kenya filed this Request for Assistance in order to have access to evidence before the ICC to assist the Government in its investigations into the six Suspects as well as all other persons suspected of involvement in the Post-Election Violence.
6. Without prejudice to this application for leave to appeal, the Government of Kenya has filed a second Request for Assistance to the Pre-Trial Chamber, dated 16 September 2011. The Government has done so in order to request specifically the confidential materials that have been identified and relied on by the Prosecutor in the present case and Case ICC-01/09-01/11. These materials will, of course, greatly assist the Government of Kenya in its national investigation. Given that it appears that the evidence relied on by the ICC Prosecutor emanates from a handful of anonymous witnesses whose whereabouts is unknown, it is impossible for the Kenyan authorities to have access to this evidence in order to conduct investigations and prosecutions in their own national system without the assistance and cooperation of the ICC. The Prosecutor has never asserted that any of this evidence could have been discovered by the Kenyan authorities acting on their own.
7. As this very evidence (albeit in redacted form) will be presented during the confirmation hearing, the Government of Kenya submits that it has proper reasons for being present in the courtroom to hear the evidence.
8. Any implication from the earlier ruling of the Pre-Trial Chamber that court proceedings at the ICC or in any well ordered legal system have to operate in hermetically sealed environments where it is only ever the parties as narrowly defined who should be allowed to be present, would be entirely misconceived. It is commonplace in national systems and before international courts for other 'non-parties' to be allowed to be present in the courtrooms, with the possibility of being asked questions by the court, or even being able to raise issues with the court. There are many examples of such representation in court including of witnesses who are due to give evidence, defendants awaiting trial who are allowed to have a legal representative with a 'watching brief' sitting in court, and Government representatives who are often permitted to be present in court when there is the potential that sensitive matters that may affect national security interests could arise.

9. Approaching the issue on a formalistic basis may add to the impression of remoteness given by the ICC to the people of Kenya as well as adding to the disrespect or disregard that has been shown the Government of Kenya, disrespect or disregard that is only enlarged by any revelation from these proceedings that there is simply no material yet available suggesting that the anonymous witness evidence relied on by the Prosecution has ever been available to Kenya in its national investigations.

(ii) Admissibility has been raised as an issue by the Suspects

10. The Government of Kenya notes that on 2 September 2011 two Suspects in the present case stated that they intend to raise issues concerning the admissibility of the case before the Court during the confirmation of charges hearing.⁶ The issue of admissibility is clearly one that directly concerns the Government of Kenya.
11. Rule 122(2) states that “[i]f a question or challenge concerning jurisdiction or admissibility arises [during the confirmation hearing], rule 58 applies.”⁷ Rule 58 provides that when a challenge or question concerning the admissibility of a case is raised, the Chamber “shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings.”⁸ The Pre-Trial Chamber has previously held that the Chamber may organise the proceedings “in the manner that best suits the circumstances of each particular case.”⁹
12. These Rules permit the Pre-Trial Chamber to allow the Government of Kenya to be present in the courtroom for the confirmation hearing, particularly during any arguments and submissions on admissibility. In this way, the legal representatives for the Government of Kenya would be available to answer any questions and assist the Pre-Trial Chamber in any matters pertaining to admissibility or related matters.

⁶ Defence Observations on the Schedule for the Confirmation of Charges Hearing, ICC-01/09-02/11-282, 1 September 2011, para. 3.; Defence observations for the Purposes of Establishing the Final Schedule of the Confirmation Hearing, ICC-01/09-02/11-278, 1 September 2011, paras. 8, 9.

⁷ Rule 122(2).

⁸ Rule 58(2).

⁹ Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, ICC-01/09-02/11-40, 4 April 2011, para. 8.

13. Chambers have permitted State representatives to be present and participate in proceedings in which admissibility issues have been raised by accused persons.¹⁰ There is no reason to depart from this practice in respect of Kenya.

14. In the event that the Pre-Trial Chamber restricts the parties' submissions on admissibility to written submissions only,¹¹ the Government of Kenya requests that it is permitted to make written observations that are relevant to the issues on admissibility that are raised. However this could not, in itself, be a reason to reject the present application as the other grounds relied on by the Government of Kenya justify the Government's presence in the courtroom.

(iii) Sensitive information concerning national security interests may arise in the hearing

15. Although the Government of Kenya is unaware of the evidence to be relied on by the Prosecutor at the confirmation hearing, it is evident from the Prosecutor's amended DCC for the present case of 19 August 2011 that certain of the allegations may involve information impinging on the national security interests of the State of Kenya. In particular, the Prosecutor alleges that the "State House" was involved in the commission of alleged crimes.¹² Leaving aside whether there is any evidence in support of these allegations, the Government of Kenya has a right to be informed about the information relied on by the Prosecution in the hearing (whether in public or private session) in order that the Government can determine whether any part of it concerns the national security interests of Kenya.

16. Article 72 specifically provides for the protection of national security information. Article 72(1) states that this Article applies "in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests" including cases falling within the scope of Article 61(3). Article 61(3) concerns the confirmation of charges hearing and states that "Within a

¹⁰ *Prosecutor v. Katanga*, Order Postponing the Hearing relating to the Challenge to Admissibility (Rule 58(2) of the Rules of Procedure and Evidence), ICC-01/04-01/07, 15 May 2009, paras. 2,4.; *Prosecutor v. Katanga*, Order to Convene a Hearing (rule 58(2) of the Rules of Procedure and Evidence), ICC-01/04-01/07, 22 May 2009, paras. 4 and 7.

¹¹ Decision on the Schedule for the Confirmation of Charges Hearing, ICC-01/09-02/11-321, 13 September 2011, paras. 12-18.

¹² Prosecution's Document Containing the Charges, List of Evidence and Comprehensive In-Depth Analysis Chart of Evidence Included in the List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3), ICC-01/09-02/11-257-AnxA, 19 August 2011, Annex A, paras. 58, 64, 65.

reasonable time before the hearing, the person shall; (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.”

17. Furthermore, Article 72(4) states that “If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.”

18. It follows that the legal representatives for the Government of Kenya must be present in the courtroom to hear the Prosecution’s submissions and evidence so that the Government can be in a position to determine whether the disclosure of any materials would prejudice its national security interests and to take appropriate steps as provided for in the Statute.¹³

(iv) The Government of Kenya is investigating the Suspects

19. Regardless of the decision of the majority of the Appeals Chamber in respect of the Government of Kenya’s admissibility challenge, the Government’s national investigation into the Suspects in this case continues. A recent investigative report of the Government of Kenya’s investigation into the Suspects has been submitted to the Court¹⁴, and further reports are being prepared. The ICC Prosecutor has noted that a further admissibility challenge could be made by the Government of Kenya.¹⁵

20. The Government of Kenya thus has a legitimate interest in being present in the courtroom as a State Party of the ICC which is actively investigating the three suspects

¹³ Before other international courts, State Representatives have been permitted to be present in hearings that may impinge upon national security interests, for example, *The Prosecutor v. Slobodan Milosevic*, Public Version of the confidential Decision on the Prosecution’s Motion to Grant Specific Protection Pursuant to Rule 70, IT-02-54-T, 25 July 2002, paras. 17-20; *The Prosecutor v. Tihomir Blaskic*, Decision of Trial Chamber I on the Prosecutor’s Motion for Video Deposition and Protective Measures, 11 November 1997, para. 32.

¹⁴ Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility, ICC-01/09-02/11-153, 4 July 2011, Annex 1.

¹⁵ ICC Rejects Kenya’s Admissibility Challenge, KNVKenya, 30 August 2011, video found at <http://www.youtube.com/watch?v=p74XMYwgyog> (minutes 1:21-1:39).

in order to hear the evidence presented and the submissions of all of the parties whether given in public or confidentially.¹⁶ The evidence and submissions presented during the confirmation hearing are directly relevant to the national investigation presently being undertaken in Kenya into the three suspects, as well as investigations and prosecutions into perpetrators at all levels.¹⁷

21. The fact that Kenya is conducting its own investigation into the same cases before the ICC is a proper basis for establishing its “standing” in the present case, as are all of the other reasons outlined above, including its Requests for Assistance for access to the evidence in the present case and its concerns about national security information.

C. Conclusion

22. For all of these reasons the Government of Kenya respectfully requests that it be permitted to have legal representation in the courtroom for the confirmation of charges proceedings.



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

Dated 16th September 2011
London, United Kingdom.

¹⁶ In the event that there is any objection to the Government of Kenya having access to any particular materials or being present in any part of the proceedings these can be raised and dealt with in the proceedings on a case by case basis if they arise. The legal representatives and the Government of Kenya would of course abide and be bound by any appropriate orders made by the Pre-Trial Chamber in respect of the confidentiality of any materials and the proceedings.

¹⁷ Filing of Annexes of Material to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 21 April 2011, Annex 3.