

Public Redacted Version

Annex A

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No.: ICC-01/09-02/11
Date: 26 October 2012**

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA AND UHURU MUIGAI
KENYATTA***

Public

Public Redacted Version of Prosecution's "Response to 'Application for a ruling on the legality of the arrest of Mr. Dennis Ole Itumbi' (ICC-01/09-02/11-497) " filed on 22 October 2012

Source: The Office of the Prosecutor

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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Legal Representatives of the Victims

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INTRODUCTION

1. On 28 September 2012, Dennis Ole Itumbi (“the Applicant”) requested that Trial Chamber V (“Chamber”): (i) rule that the Applicant was illegally arrested in the context of an investigation instigated by the OTP or, otherwise, in connection with proceedings before the International Criminal Court (“Court”); or (ii) in the alternative, should the Chamber decide that it lacks procedural competence to deal with the Applicant’s request, to refer it to another chamber pursuant to Article 64(4) of the Rome Statute (“Application”).¹ The Applicant states that this Application is a preliminary step to later requesting compensation under Article 85(1) of the Rome Statute (“Statute”).²
2. In particular, in relation to the request for a ruling on the alleged illegal arrest, the Applicant requests the Chamber to decide whether (i) the Applicant was arrested in connection with Court proceedings; (ii) the Applicant’s arrest was illegal; and (iii) the illegality of the arrest need be attributed specifically to the Prosecution.³
3. As a preliminary matter, the submissions of the Applicant themselves do not even clarify if he was *arrested* – i.e. taken into custody for suspicion of committing a crime -- or *detained* for questioning. But regardless of the nature of Kenya’s restrictions on his liberty, the Applicant’s request for relief from this Court must fail. In response, the Prosecution submits the following:
 - (i) The issue is not whether the alleged illegal arrest or detention by the Kenyan authorities was somehow “*in connection with* Court proceedings”. Rather, the question is whether the Applicant was arrested or detained pursuant to a request by the Court under either Article 89 (“Article 89 request”) or Article 93(1)(b) and (c). The Chamber should review the Applicant’s arrest or detention only if it is first established that the arrest was attributable to or effectuated at the request of the Court or, more particularly, the Prosecution.

¹ ICC-01/09-02/11-497.

² ICC-01/09-02/11-497, para.11.

³ ICC-01/09-02/11-497.

(ii) Here, the Prosecution did not request and was not otherwise involved in the Applicant's arrest or detention. Accordingly, this Court should not further consider the question of whether the arrest or detention of the Applicant was illegal; that is a matter only for the relevant Kenyan judicial authorities to consider.

(iii) Although the legality of the Applicant's arrest or detention is not a matter within the Court's jurisdiction and determination, on the basis of the information available to the Prosecution and a review of the applicable Kenyan legislation, it appears that the Kenyan authorities had a legal basis for arresting or detaining the Applicant. A final determination can only be made, however, by the appropriate Kenyan authorities with complete access to the facts and knowledge of the relevant law.

iv) As the Applicant was not arrested or detained at the Prosecution's request, but rather arrested pursuant to Kenyan domestic law and by Kenyan authorities,⁴ he cannot validly make a compensation claim before the Court pursuant to Article 85(1). A claim for compensation, if *ad arguendo* justifiable, would need to be made before the competent national authorities.

CONFIDENTIALITY

4. The Prosecution requests that the Chamber receive this filing as confidential and *ex parte* available to the Prosecution and VWU only, pursuant to Regulation 23bis(1) of the Regulations of the Court, Article 68(1) of the Rome Statute ("Statute") and Rule 81 of the Rules of Procedure and Evidence ("Rules") to [REDACTED]. The Prosecution proposes to file subsequently confidential redacted and public versions.

⁴ ICC-01/09-02/11-497, paras.

BACKGROUND

5. [REDACTED].⁵
6. [REDACTED].
7. [REDACTED]:
 - (a) [REDACTED];
 - (b) [REDACTED],⁶ [REDACTED]; and
 - (c) [REDACTED].
8. [REDACTED],⁷ [REDACTED].⁸
9. [REDACTED]:
 - (i) [REDACTED]:⁹
 - a. [REDACTED].¹⁰
 - b. [REDACTED]¹¹ [REDACTED].¹²
 - (ii) [REDACTED].¹³
 - (iii) [REDACTED].¹⁴ [REDACTED]¹⁵
10. [REDACTED].¹⁶ [REDACTED].
11. [REDACTED].
12. [REDACTED].¹⁷ [REDACTED].¹⁸ [REDACTED].¹⁹ [REDACTED].²⁰

⁵ [REDACTED].

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

13. On 21 September 2012 the Applicant informed the Pre-Trial Chamber II that he had been arrested and detained on 22 March 2012 by Kenyan authorities and asked that the Pre-Trial Chamber II rule on the legality of that arrest, asserting that it was in the context of an investigation instigated by the Prosecution and conducted in connection with current Court proceedings (“Initial Application”).²¹ The Prosecution was notified of the Initial Application.
14. On 25 September 2012, Pre-Trial Chamber II dismissed the Applicant’s Initial Application ruling that it was not procedurally competent to deal with the Application as Trial Chamber V had already been constituted to deal with the conduct of ‘subsequent proceedings’.²²
15. On 28 September 2012, the Applicant made his Application before Trial Chamber V.²³

SUBMISSIONS

(I) Under Article 85 of the Statute, any alleged “unlawful arrest” must relate to an ICC arrest warrant

16. The Applicant seeks an initial ruling on the legality of his arrest by the Kenyan authorities in order to make a claim for compensation under Article 85 of the Statute and Rule 173 of the Rules of Procedure and Evidence (“Rules”).²⁴
17. Article 85 entitles victims of an “unlawful arrest or detention” to seek compensation, but only if the arrest was requested and conducted pursuant to the Statute.²⁵

²¹ ICC-01/09-105.

²² ICC-01/09-106.

²³ ICC-01/09-02/11-497.

²⁴ ICC-01/09-02/11-497, para.11.

²⁵ See e.g. C. Staker “Article 85”, in *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article – Second Edition*, C.H.Beck Hart Nomos, 2008, p.1501: “In the context of the ICC, this provision would apply in cases *where a person is arrested or detained in violation of specific provisions of the Statute* (in particular, article 55 para.1 (d) or the Rules, and presumably, where the arrest or detention was unlawful under other applicable rules of international law”. (Italics added). The Applicant’s argument (ICC-01/09-02/11-497, paras.43-44) that Staker suggests that Article 85 may relate to unlawful conduct by national authorities for arrests and detentions in connection with proceedings before the Court is misleading, as Staker is clearly referring to Court proceedings following an arrest requested by the Court. Staker states at p.1501: “[a]s arrests are executed by States, and in view of the requirement in article 59 para. 1 that the arrest of a person by a State shall be ‘in accordance with its laws’, this paragraph could arguably apply also to

18. The statutory framework makes clear that whatever arrest or detention occurred was not undertaken pursuant to an ICC warrant issued under the Rome Statute. {REDACTED}.²⁶ If there are reasonable grounds to believe that a person has committed an offence under Article 70, the Prosecution may request that the Pre-Trial Chamber issue an arrest warrant under Article 58 of the Statute. Upon issuance of that warrant, the Court may then request national authorities to effect the person's arrest and surrender under Article 89 of the Statute.

19. In this case, the Prosecution did not request the Court to issue a warrant or to seek the Applicant's arrest by national authorities. [REDACTED].

(II) The Prosecution neither requested the Applicant's arrest or detention nor was the Prosecution involved in his arrest or detention.

20. The Prosecution also did not ask the Kenyan authorities to detain the Applicant for questioning pursuant to a request for judicial assistance under Article 93(1)(b) and (c).

21. [REDACTED]²⁷ [REDACTED].²⁸

22. The Prosecution did not request the arrest or detention of the Applicant; it did not take part in the execution of the request for legal assistance; and specifically it did not request that he be arrested or detained. In sum, assuming that the Kenyan authorities illegally subjected the Applicant to an arrest/detention, their action was not related to or pursuant to an ICC warrant or a request for questioning pursuant to Article 93(1)(b)-(c). The Prosecution, moreover, did not instigate it and was not otherwise involved in it. The action was taken on the initiative of the Kenyan authorities, pursuant to their own laws and procedure.

arrests or detentions by State authorities in connection with proceedings before the Court, which are unlawful under the national law of that State".

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

(IV) The relevant forum is not the Court but the Kenyan judiciary

23. [REDACTED].²⁹ [REDACTED].³⁰

24. [REDACTED], the most appropriate forum for review of compliance of those investigations with national laws must be the national courts, which are better placed to consider the violation of any of the State's laws.

25. Even in the case of Article 59 arrest proceedings, the Appeals Chamber has confirmed that: *"the Court does not sit in the process [...] on judgment as a court of appeal on the identificatory decision of the [...] [respective] judicial authority"*.³¹ When the arrest or detention of an individual by a State is *not* pursuant to a request of this Court, there is no basis for this Court to review the legality of the State's actions.

26. [REDACTED].

27. Accordingly, if the Kenyan authorities decided to arrest or detain the Applicant and even if, *ad arguendo*, there were irregularities in the manner in which this was conducted, the appropriate legal forum is not the Court, but the relevant Kenyan judicial authority. This is because (i) any such alleged acts were not done at the Prosecution's request or involvement; and (ii) it was the Kenyan authorities who carried out the arrest or detention pursuant to Kenyan national laws.

(V) Legality of the Applicant's arrest and detention

28. The Prosecution's position is that if the Applicant was arrested (although this is not clear as he may have been detained for questioning), his arrest and detention was executed pursuant to Kenyan law and procedure and not at the Prosecution's request or pursuant to an ICC warrant. Accordingly, the question of the legality of the arrest need not be determined. Moreover, the facts related to the

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ ICC-01/04-01/06-772 OA4, para.41.

Applicant's arrest or detention do not appear to be fully before the Court, so that it would be impossible on this record to conclusively resolve the issue of legality.

29. The Prosecution observes, from the information that the Applicant supplies, that there appears to be a legal basis for the Kenyan authorities to have arrested or detained him for acts committed in Kenya that, as shown below, at least colourably appear to be in violation of Kenyan law. A final determination of this question can only be made, however, by the Kenyan authorities.

30. [REDACTED].³²

CONCLUSION

31. For all of the foregoing reasons, the Prosecution asks that Trial Chamber V reject the Applicant's Application in its entirety.



Fatou Bensouda,
Prosecutor

Dated this 26th day of October 2012

At The Hague, The Netherlands

³² [REDACTED]