

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 28 April 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 THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

PUBLIC

**Prosecution Response to “Application on behalf of the Government of the Republic
of Kenya pursuant to Article 19 of the ICC Statute”**

Source: Office of the Prosecutor

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Court to:

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor
Adesola Adeboyejo, Trial Lawyer

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:

Karim Khan and Kennedy Ogetto

Counsel for Uhuru Muigai Kenyatta:

Steven Kay QC and Gillian Higgins

Counsel for Mohammed Hussein Ali:

Gregory Kehoe, Evans Monari, Gershon
Otachi and John Philpott

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Silvana Arbia, Registrar
Didier Preira, Deputy-Registrar

Victims and Witnesses Unit

Defence Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 31 March 2011, the Government of the Republic of Kenya (“the Applicant”) submitted a single application challenging the admissibility of both cases (“the Kenya cases”) arising from the investigation into the situation in Kenya (“the Admissibility Application”) pursuant to Articles 17(1)(a) and 19(2)(b) of the Rome Statute (“the Statute”). The Applicant asserts that it has almost completed the domestic reforms necessary to allow it to begin investigating and prosecuting the persons responsible for the violence following the 2007 elections.
2. The Prosecution welcomes the Government of Kenya’s professed commitment to institute measures to do justice for the victims of the post election violence and promote the rule of law. As recalled in the preamble of the Statute, the primary responsibility for the investigation and prosecution of the most serious crimes of international concerns resides at the national level.
3. Nonetheless, the Prosecution submits that the Applicant has failed to show that it is investigating or prosecuting the suspects for the conduct that is the subject matter of the present case.
4. Absent genuine national proceedings related to the cases which are before the Chamber, the Prosecution’s case against Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali remains admissible.

Procedural History

5. On 26 November 2009, the Prosecutor filed its “Request for authorization of an investigation pursuant to Article 15”.¹ On 31 March 2010, Pre-Trial Chamber II

¹ICC-01/09-3 and its annexes.

granted that request, establishing that the Prosecution's anticipated future cases were admissible based on evidence available at that time.²

6. The Government of Kenya was on notice and had the opportunity to inform the Court of an ongoing investigation, pursuant to Article 18(1) and (2). However, the Applicant did not request that the Prosecution defer its investigation into the situation in Kenya.³
7. On 15 December 2010, the Prosecutor submitted two applications pursuant to Article 58 seeking summonses to appear for (i) William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,⁴ and (ii) Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali⁵ ("the suspects"). Pre-Trial Chamber II granted these applications on 8 March 2011, and issued summonses for the suspects to appear before the Court on 7 and 8 April 2011.⁶
8. On 31 March 2011, the Applicant filed its Admissibility Application, requesting that Pre-Trial Chamber II (i) determine that the cases against the suspects are inadmissible; (ii) convene a status conference on the matter with the Applicant and the parties; and (iii) afford the Applicant a separate time to address the Chamber during the suspects' initial appearances.⁷

² ICC-01/09-19-Corr, para. 187 (subject to the satisfaction of the gravity threshold under article 17(d) of the Statute).

³ ICC-01/09-01/11-01, fn 2; ICC-01/09-02/11-01, fn 2.

⁴ ICC-01/09-30-RED.

⁵ ICC-01/09-31-RED.

⁶ ICC-01/09-01/11-01 and ICC-01/09-02/11-01, respectively.

⁷ ICC-01/09-02/11-26, paras. 80-82.

9. On 4 April 2011, Pre-Trial Chamber II denied requests (ii) and (iii), and ordered the Prosecution, the suspects and relevant victims to submit written observations on the Admissibility Application by no later than 28 April 2011.⁸
10. On 7 and 8 April 2011, the six suspects appeared as summoned, and the Chamber set the confirmation hearings to start on 1 and 21 September 2011, respectively.⁹
11. On 21 April 2011, the Applicant filed 22 supplemental annexes of material to supplement its original Admissibility Application¹⁰ (“supplemental annexes”).

Submissions

A. Burden of proof

12. The party challenging admissibility bears the burden to demonstrate that the case is inadmissible.¹¹ Thus, it lies with the Government of Kenya, as Applicant, to satisfy the Chamber that the case currently before the Court is inadmissible. Accepting at their face value all its assertions, the Application still does not show that the Government of Kenya has conducted or is conducting investigations or prosecutions in relation to the cases before this Court.

B. The Applicant’s arguments.

13. The Applicant does not allege that it is currently investigating or prosecuting any of the persons prosecuted by the International Criminal Court.¹² Rather, it sets forth the

⁸ ICC-01/09-02/11-40, p. 7 (victims who had submitted applications to participate in the Court’s proceedings with regard to the cases against the suspects were also invited to make written observations).

⁹ ICC-01/09-01/11-T-1-ENG, p. 17 lines 19-21; ICC-01/09-02/11-T-1-ENG, p. 14 lines 11-15.

¹⁰ ICC-01/09-02/11-67 and related annexes 1-22 (“Supplemental Annexes”).

¹¹ *Prosecutor v. Bemba*, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, 24 June 2010, paras. 201, 203. Trial Chamber II also held that the appropriate standard of proof is the “balance of probabilities”.

¹² E.g. Application, paras. 34, 47, 48.

reforms that the Government of Kenya has enacted in the two years since the post-election violence to enable it to “try all cases at whatever level arising from the post-election violence.”¹³ The Applicant asserts that the case is inadmissible pursuant to Articles 17 and 19 as long as the Applicant is investigating or prosecuting persons “at the same level in the hierarchy being investigated by the ICC” for “the same conduct”,¹⁴ which it asserts it intends to do.¹⁵

14. The Applicant acknowledges that the necessary reform process for the domestic investigation and prosecution of alleged perpetrators of the post-election violence is ongoing and incomplete.¹⁶ The Applicant provides the Chamber with a prospective timetable for completing its reform process and initiating investigations, the latter of which are apparently to be conducted pursuant to a “bottom up” investigation strategy of “building on the investigation and prosecution of lower level perpetrators to reach up to those at the highest levels who may have been responsible”.¹⁷

15. According to the Applicant, the process *will be completed* within the next six months.¹⁸ The Applicant offers to submit progress reports in July, August and September 2011.¹⁹ In order to enable the Court to consider such ongoing reform efforts over the coming months, it asks that the Chamber extend the period of “the proceedings concerning the admissibility challenge” by the same six month time period. The Applicant alleges that the reforms implemented in Kenya’s legal system and timetable presented satisfy the legal requirements for finding the cases inadmissible under Article 17(1)(a), on the grounds that the relevant period for determining an

¹³ Application, paras. 8, 34, 47-59.

¹⁴ Application, para. 32.

¹⁵ Application, para. 32.

¹⁶ Application, para. 9.

¹⁷ Application, para. 71.

¹⁸ Application, paras. 13, 16, 61.

¹⁹ Application, paras. 48, 66, 79.

admissibility challenge is “when the application is being considered and determined as a whole and not merely the date on which the application is first filed”.²⁰

C. The admissibility assessment is time specific and case specific.

16. The Applicant, in short, is requesting that the Chamber depart from the explicit language of Article 17, which requires the Court to conduct a case-specific assessment of the situation at the time the admissibility challenge is raised.

17. The Appeals Chamber has ruled that the admissibility of a case under Article 17(1)(a) “must be determined on the basis of the *facts* as they exist at the time of the proceedings concerning the admissibility challenge”.²¹ Pre-Trial Chamber II, in its second admissibility decision in *Prosecutor v. Kony et al.*, held that a Chamber cannot determine admissibility by engaging in “hypothetical judicial determination” of the possibility of future national proceedings.²² In similar fashion, the Appeals Chamber stated, “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.*”²³

D. The Standard: existence of national proceedings against same persons for the same conduct.

18. Determination whether a case is inadmissible under Article 17(1)(a) hinges upon “whether there are ongoing investigations or prosecutions” at the time of the

²⁰ Application, para. 19.

²¹ *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. 56 (emphasis added).

²² *Prosecutor v. Joseph Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, paras. 47-52.

²³ *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 (emphasis added).

proceedings concerning the admissibility challenge.²⁴ An absence of relevant national proceedings will render the case before the Court admissible (assuming the requirement of gravity is met under Article 17(1)(d)).²⁵ If a State is conducting investigations or prosecutions in relation to other persons, that is not the same case, and those investigations or prosecutions have no bearing on the case before the Court. Since the two forums can exercise jurisdiction concurrently, the case is admissible. Similarly, if a State is conducting investigations or prosecutions in relation to the same person for other conduct, the case before this Court is admissible, and the Court and the State can mutually cooperate to affect both proceedings.²⁶

19. Different Chambers of the Court have consistently held that a case is only inadmissible if the State is investigating or prosecuting the same person for the same conduct that is the subject of the case before the Court.²⁷

20. The fact that the Applicant is a State and is promising to conduct proceedings is not a valid reason to modify this substantive criterion. Consistently, Pre-Trial, Trial and

²⁴ *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 OA8, 25 September 2009, paras. 78, 80.

²⁵ *Ibid*, para. 78.

²⁶ Articles 89(4) and 94, ICC Statute. See also *Prosecutor v. Katanga and Ngudjolo*, "Public Redacted Version of the 19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", ICC-01/04-01/07-1007, 30 March 2009, paras. 51-89.

²⁷ While this test has not been ruled on by the Appeals Chamber, it is consistently applied by other Chambers of the Court. *Prosecutor v. Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/06-8-Corr, 24 February 2006, paras. 31, 38-39; *Ahmad Harun and Ali Kushayb*, Decision on the Prosecution Application under Art. 58(7) of the Statute, ICC-02/05-01/07-1-Corr, 27 April 2007, para. 24; *Prosecutor v. Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, paras. 17-18; *Prosecutor v. Bemba*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, 10 June 2008, para. 21; *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009, para. 50; *Prosecutor v. Abu Garda*, Decision on the Prosecutor's Application under Article 58, ICC-02/05-02/09-15-AnxA, 7 May 2009 (made public on 29 July 2009), para. 4.

Appeal Chambers that ruled on admissibility matters made no distinction based on the party or participant presenting the challenge or the particular timing of the challenge; in all instances, regardless of challenging party or timing of the challenge, the legal analysis of the Chambers has remained constant.²⁸

E. A state admissibility challenge under Article 19(4) shall not be a mechanism to unduly delay the proceedings.

21. The system created by the Rome Statute for the determination of admissibility relies on a mechanism of early notice (Article 18(1)); strict timelines for States to inform the Court that they are investigating or prosecuting (Article 18(2)); timely submission of challenges by a State which has jurisdiction over a case on the ground that is investigating or prosecuting the case (Article 19(5)); and confining the number of times a challenge can be brought by a State (Article 19(4)). The goal is to respect the right of the State and at the same time prevent a State from interfering with and obstructing Court's proceedings by making admissibility challenges when it does not genuinely intend to prosecute in its national courts. Rule 58 also provides that, in deciding on the procedure to be followed upon an application under Article 19, the Chamber shall have regard that the procedure, including joining proceedings, "does not cause undue delay" and that it shall hear and decide on the challenge first. Permitting a lengthy timetable for submissions in order to evaluate the evolution of the local judicial institutions has no basis in the Statute, does not entail a case specific inquiry, and would undermine the expeditious conduct of proceedings.

22. If after the Chamber decides on this admissibility challenge the State initiates genuine proceedings against the same person for the same conduct, the State can

²⁸ See footnotes 23, 24 and 27, *supra*.

inform the Chamber and seek leave to file a second admissibility challenge in accordance with Article 17.

F. The Chamber should reject the Applicant's supplemental Annexes, which in any event do not demonstrate that genuine national proceedings are currently underway.

23. The Prosecution asserts that the Chamber should reject the 22 supplemental annexes that the Applicant filed on 21 April 2011, three weeks after filing its initial Admissibility Application on 31 March 2011, and only one week before responses were due from the Prosecution and relevant victims on 28 April 2011. No provision of the Rome Statute, Rules of Procedure and Evidence, or the Rules of the Court permits participants to file supplemental materials without leave of the Court, or for that matter, to file its admissibility application in instalments. The Applicant has not shown good cause to submit these voluminous documents (totalling over 900 pages) several weeks after its Application was filed. In particular, supplemental annexes 4-22 existed prior to 31 March 2011,²⁹ and the Applicant has not even attempted to justify the delay in filing them. The Prosecution thus asserts that the Chamber should treat the Applicant's Supplemental Annexes as having been filed out of time³⁰ and reject them.

24. In any case, the Application as well as the late submitted annexes effectively demonstrate that there is currently no national investigation or prosecution related to the suspects for the conduct which forms the subject of the cases before the Court.³¹

²⁹ Arguably, supplemental annex 3 also existing prior to 31 March 2011; it is vaguely dated "March 2011".

³⁰ See Regulation 35 of the Regulations of the Court.

³¹ Application, para. 32 (indicating that national investigations and prosecutions in Kenya must only "cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC", which indicates that investigations of the suspects, or even persons at the same level as the suspects,

25. The Applicant indicates that its Supplemental Annexes “support the Government’s Application as they demonstrate that the Government is investigating the two cases presently before the ICC”.³² That suggestion is untrue. Supplemental Annex 1 indicates that on 14 April 2011, Kenya’s Attorney General Amos Wako instructed the current Commissioner of Police to “to investigate all other persons against whom there may be allegation of participation in the Post-Elections Violence, including the six persons who are the subject of the proceedings currently before the International Criminal Court”.³³ This 14 April instruction -- to begin an investigation -- confirms that the suspects before the Court were not yet under domestic investigation or prosecution when the Applicant filed its Admissibility Application on 31 March. It further confirms that domestic cases against the suspects are, at this stage, still merely hypothetical.

26. Similarly, Supplemental Annexes 2-22 do not show that the Applicant is investigating or prosecuting the suspects for the conduct that forms the subject matter of their cases before the Court. These annexes only show:

- Recently passed legislation to facilitate prosecution of post-election violence cases in Kenya;³⁴

have not been initiated), para. 71 (indicating that the Applicant intends for future investigations and prosecutions of “lower level perpetrators to reach up to those at the highest levels who may have been responsible”, which shows that such investigations and prosecutions are not extant at this time); Supplemental Annex 1, p. 3 (directing the Commissioner of Police “to investigate all other persons against whom there may be allegations of participation in the Post-Elections Violence, including the six persons who are the subject of the proceedings currently before the International Criminal Court”, which indicates that they are not currently under investigation).

³² ICC-01/09-02/11-67, para. 3.

³³ Supplemental Annex 1, p. 3.

³⁴ Supplemental Annexes 16-22.

- Kenya's reported current capability to prosecute crimes, including post-election violence cases,³⁵ though it is noted in one annex that "our Witness Protection Programme is yet to be fully operationalised";³⁶
- General discussion of the principle of complementarity;³⁷
- General support for the Applicant to try post-election violence cases domestically, should it be fully willing and able to do so;³⁸ and
- Steps that have been taken to prosecute post-election violence cases generally, which do not include any current Kenyan investigation or prosecution of the six suspects before the ICC.³⁹

27. In short, the late-filed Supplemental Annexes add nothing substantive to the original Application. The same shortcomings identified in that Application continue to exist, notwithstanding the recent instruction to investigate these suspects identified in Supplemental Annex 1.⁴⁰

G. Conclusion

28. Thus, because the Applicant has not met its burden to establish that it is currently investigating or prosecuting the suspects for the same conduct which form the subject of their cases before the Court, the cases remain admissible.

³⁵ Supplemental Annexes 11-15.

³⁶ Supplemental Annex 15 p. 11.

³⁷ Supplemental Annexes 5-7.

³⁸ Supplemental Annexes 4, 8-10.

³⁹ Supplemental Annexes 1-3.

⁴⁰ As set out above, despite the inexplicable late filing of the 22 Supplemental Annexes, the Prosecution has attempted to address them within the original time frame. Should the Chamber have concerns about their content, however, or if the Applicant in a reply to this filing makes new affirmative arguments related to these documents, the Prosecution reserves its right to make further submissions, with leave of the Court.

Relief

29. The Prosecution therefore respectfully requests the Pre-Trial Chamber to dismiss the Applicant's admissibility challenge and declare that the cases against Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali are admissible.



Luis Moreno-Ocampo
Prosecutor

Dated this 28th day of April 2011
At The Hague, The Netherlands