



Original: **English**

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

Date: **21 June 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 Document

Prosecution's Response to the "Application on behalf of the Government of Kenya for Leave to Reply to the Responses by the Prosecutor and the OPCV to the Government of Kenya's Application for Leave to Appeal a Procedural Error in the Decision on Admissibility"

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the*

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Introduction

1. On 31 March 2011, the Government of Kenya (“GoK”) filed its challenge to the admissibility of the case against Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, Mohammed Hussein Ali (“Admissibility Challenge”).¹
2. On 21 April 2011, the GoK filed a request for cooperation and assistance under article 93(10) and Rule 194 (“Cooperation Request”),² seeking the Court’s assistance in the form of receiving “all statements, documents, or other types of evidence” obtained in the course of the Prosecutor’s investigations.³ According to the GoK, this will assist the national authorities in conducting and advancing their investigations and prosecutions into the Post-Election Violence.⁴ Therefore, the GoK requested the Pre-Trial Chamber to address the matter prior to ruling in the merits of the admissibility challenge.
3. On 30 May 2011, the Pre-Trial Chamber issued the decision on the Admissibility Challenge (“Decision”),⁵ concluding that the case is admissible. As a preliminary matter, the Pre-Trial Chamber found that the Cooperation Request is unrelated to the Admissibility Challenge and concluded that it “shall rule on the merits of the Cooperation Request in a separate decision to be issued subsequently”.⁶
4. On 6 June 2011, the GoK filed an appeal against the Decision pursuant to Article 82(1)(a) (“Appeal”).⁷ On the same day, the GoK also filed an application for leave to appeal a procedural error in the Decision (“Application”).⁸

¹ ICC-01/09-02/11-26.

² ICC-01/09-58.

³ Cooperation Request, p.3.

⁴ Cooperation Request, p.3.

⁵ ICC-01/09-02/11-96.

⁶ Decision, paras.32-35.

⁷ ICC-01/09-02/11-104.

⁸ ICC-01/09-02/11-105.

5. On 10 June 2011, the Prosecution and OPCV responded to the Application (“Prosecution’s Response” and “OPCV’s Response”, respectively).⁹
6. On 17 June 2011, the Government of Kenya filed an application for leave to reply to the Prosecution’s and OPCV’s Responses.¹⁰

Submissions

7. The Prosecution notes that although the Government of Kenya supposedly seeks prior leave from the Chamber, its filing already advances arguments on the merits.¹¹ In effect, and as acknowledged by the Government of Kenya,¹² the Application is the Reply. Thus, even if the application is denied, the arguments have already been put before the Chamber. This tactic contravenes Regulation 24(5) of the Regulations of the Court and has been repeatedly censured by the Appeals Chamber, which has expressly refused to entertain substantive replies when the requisite prior leave of the Court was not sought or given.¹³

⁹ ICC-01/09-02/11-113 (Prosecution’s Response); ICC-01/09-02/11-111 (OPCV’s Response).

¹⁰ ICC-01/09-02/11-128 (“GoK Leave to Reply”).

¹¹ See paras.8-15 of the GoK’s Leave to Reply, whereby the GoK addresses at length the five points it purportedly seeks leave to reply.

¹² See Application, para.6.

¹³ “The Appeals Chamber disapproves of a practice of the filing of a substantive reply prior to leave being granted by the Appeals Chamber, which in and of itself may also give rise to the rejection of an application for leave.” See ICC-01/04-01/06-824 OA7, para.68. Also ICC-01/05-01/08-602 OA2, para.9: “In accordance with rule 103 [...], the submission of substantive observations is only permissible after a Chamber has decided to invite or grant leave to do so. In the present circumstances, Aprocdec submitted substantive observations on the appeal in paragraphs 35 through 74 of the application without leave. For that reason, the Appeals Chamber shall disregard the substantive submissions contained in the Amicus Application.”

Conclusion

8. For the reasons set out above, the Prosecution requests that the Pre-Trial Chamber deny the Application for Leave to Reply and disregard the submissions contained therein.



Luis Moreno-Ocampo
Prosecutor

Dated this 21st day of June, 2011
At The Hague, The Netherlands