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

Date: **10 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 Government of Kenya's Application for Leave to Appeal a Procedural Error in the Decision on Admissibility (ICC-01/09-02/11-105)

Source: The Office of the Prosecutor

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

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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 and Mohammed Hussein Ali (“Admissibility Challenge”).¹
2. On 21 April 2011, three weeks after filing its admissibility challenge, 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 It requests that the issue of whether the Cooperation Request should have been decided before the

¹ ICC-01/09-02/11-26.

² ICC-01/09-58.

³ Cooperation Request, p.3.

⁴ Cooperation Request, p.3.

⁵ ICC-01/09-01/11-96.

⁶ Decision, paras.28-31.

⁷ ICC-01/09-01/11-104.

⁸ ICC-01/09-01/11-105.

Chamber's final determination of the Admissibility Challenge ("Issue") be certified for appeal pursuant to Article 82(1)(d).⁹ The GoK submits that its primary position is that it may raise the invoked error in respect of the failure to decide the Cooperation Request as part of the appeal against the Decision without seeking leave, but has filed the Application in case the Appeals Chamber decides that it cannot consider this particular error as part of the Appeal.¹⁰

5. The Prosecution submits that the Issue does not constitute an appealable issue within the meaning of Article 82(1)(d). The Issue also fails to meet the requirements for leave to appeal. Consequently, the Prosecution requests that the Application be rejected.
6. The Prosecution reserves its position as to whether the Issue can be heard by the Appeals Chamber as part of the admissibility Appeal and will present its submissions to that effect to the Appeals Chamber, if required.

The Issue does not constitute an appealable issue

7. The Appeals Chamber has held that "only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination."¹¹
8. The Prosecution submits that the procedural question identified in the Issue was not a relevant consideration for the determination of the matter before the Pre-Trial Chamber, namely whether this case is admissible before the Court. Rather,

⁹ Application, para.2.

¹⁰ Application, para.3.

¹¹ ICC-01/04-01/06-168 OA3, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that "[a] decision "involves" an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

the Pre-Trial Chamber dealt with this procedural aspect as a separate matter, divorced from the actual Admissibility Challenge. It did so to resolve any uncertainty as to whether the Chamber is required to rule on the request for assistance before entering a determination on its admissibility challenge. The Pre-Trial Chamber expressly concluded that “a determination on the inadmissibility of a case pursuant to article 17 of the Statute does not depend on granting or denying a request for assistance under article 93(10) of the Statute”, while emphasizing that it would rule on the merits of the Cooperation request separately.¹² The fact that Kenya filed its request for legal assistance three weeks after it filed its admissibility challenge further indicates that even the Government of Kenya did not initially consider that resolution of its admissibility challenge was intertwined with a decision with respect to legal assistance. As the Chamber observed, at the time the Government of Kenya lodged the challenge, it never purported that it was dependent on any future request under article 93(10) of the Statute; if the Government believed that these requests were inter-related, it should have presented them together and not after this period of time had elapsed.¹³

9. The GoK argues that a decision on the Cooperation Request might have an impact on any future investigations by national authorities.¹⁴ However, even if such impact on possible future national proceedings existed, it could never be relevant for the purposes of the Chamber’s determination of admissibility since “the admissibility of the case must be determined ‘on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge’”.¹⁵ However, as noted above, at the time of the initiation of the proceedings there

¹² Decision, para.30.

¹³ Decision, para.29.

¹⁴ See Application, paras.6-7.

¹⁵ Decision, para.66, relying on ICC-01/04-01/07-1497 OA8, para. 56.

was no Cooperation Request, and that request in any event aims to develop evidence at some uncertain point in the future.¹⁶

10. The Prosecution further notes that in its decision of 4 April 2011, on the conduct of proceedings concerning the admissibility challenge, the Chamber had expressly put the parties and participants on notice of its intention to expedite the proceedings and avoid any unnecessary delay, deeming it sufficient to confine the engagement of the parties in the Article 19 proceedings to providing written observations.¹⁷ Thus, 17 days before the Government made its cooperation request, it was clear to all that the proceedings would be concluded expeditiously.

The Issue does not meet the criteria for leave to appeal

11. The GoK argues that the Issue impacts on the fairness of the proceedings, as it denies the GoK of potential evidence in its national investigations and in its Admissibility Challenge.¹⁸ First, whether any evidence will be shared as a result of a decision on the Cooperation Request is speculative. The Pre-Trial Chamber correctly pointed out that the regime of requests for assistance under Article 93(10) is discretionary and “does not impose any obligation [...] on the Court”.¹⁹ Second, even if information was forthcoming as a result of the Cooperation Request, and that information would be used to trigger national investigations, the Issue cannot have any impact on the fairness of the admissibility proceedings. The scope of admissibility proceedings and any ensuing decision on admissibility is limited to the facts as they existed at the time of the proceedings concerning the Admissibility Challenge. A Cooperation Request which aims at fostering potential future investigations, so as to modify the factual circumstances

¹⁶ The Pre-Trial Chamber correctly stressed the fact that the Cooperation Request was filed three weeks after the Admissibility Challenge (see Decision, para.29).

¹⁷ ICC-01/09-02/11-40 (4 April 2011), para 10.

¹⁸ Application, para.7.

¹⁹ Decision, para.31.

otherwise prevailing at the time of the challenge, cannot produce any retroactive effect on the fairness of extant admissibility proceedings.

12. Also, the GoK does not provide any arguments on how the Issue impacts on the expeditious conduct of the proceedings other than submitting that it is required “to launch a fresh challenge to admissibility on receiving the Prosecutor’s evidence”.²⁰ The GoK deliberately chose the timing for its Admissibility Challenge thereby limiting its challenge to the facts as they existed at that time. The suggestion that possible future investigations might change the relevant factual basis and therefore require an additional challenge to the admissibility is purely speculative and fails to demonstrate any impact of the Issue on the expeditious conduct of the proceedings.

13. For the same reason, the immediate resolution of the Issue by the Appeals Chamber would also not materially advance the proceedings. Under the existing Appeals Chamber’s jurisprudence, an admissibility decision must be based on the facts as they exist at the time of the proceedings concerning the admissibility challenge.²¹ Even in the event that the Appeals Chamber were to overrule the Admissibility Decision itself or to direct the Pre-Trial Chamber to decide on the Cooperation Request prior to the Admissibility Challenge,²² that would not have any necessary consequences on the Pre-Trial Chamber’s determination on admissibility.

²⁰ Application, para.7.

²¹ ICC-01/04-01/07-1497 OA8, para. 56.

²² Application, para.8.

Conclusion

14. For the reasons set out above, the Prosecution requests that the Pre-Trial Chamber reject the Application.



Luis Moreno-Ocampo
Prosecutor

Dated this 10th day of June, 2011
At The Hague, The Netherlands