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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

**Government of Kenya's Application for Leave to Appeal a Procedural Error in the
"Decision on the Application by the Government of Kenya Challenging the
Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"**

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:

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A. Introduction

1. The Government of Kenya respectfully submits this application before Pre-Trial Chamber II under Article 82(1)(d) of the Statute for leave to appeal a procedural finding of the Pre-Trial Chamber in its “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute” dated 30 May 2011 (the “Admissibility Decision”).¹
2. The specific finding that the Government of Kenya seeks leave to appeal is the Chamber’s holding that the Government’s Request for Assistance of 21 April 2011 need not have been decided *before* the Chamber’s final determination of the Government’s Admissibility Application. The Chamber dealt with this matter in a separate section of the Admissibility Decision as a “Preliminary Determination on the Cooperation Request”.² It noted that the Government of Kenya “never purported” in its Admissibility Application that this application was “*dependent*” on any future Request for Assistance, and that the Government of Kenya should have filed them together if the Government believed that they were “inter-related”³ (whether “inter-related” is a *functional* or *formal procedural* concept in this setting may have been left unclear by the Pre-Trial Chamber – see below). The Chamber found that there was no justification for linking the Admissibility Application with the Request for Assistance, and hence stated that the Request for Assistance would be ruled upon in a subsequent decision.
3. The Government of Kenya has today filed its appeal against the Admissibility Decision with the Appeals Chamber pursuant to Article 82(1)(a) which provides the Government with an automatic right of appeal to the Appeals Chamber. This appeal covers all of the errors in the Admissibility Decision, including the procedural errors of not permitting an oral hearing⁴ and not deciding on the Government’s Request for

¹ ICC-01/09-01/11-101 (hereinafter “Admissibility Decision”).

² Admissibility Decision, para. 32-35.

³ Admissibility Decision, para. 29.

⁴ The Chamber’s refusal to hold an oral hearing is a procedural error that is plainly within those errors that the Appeals Chamber has recognised may be relied on under Article 82(1)(a) (see *Prosecutor v. Kony et al.*, Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19(1) of the Statute” of 10 March 2009, ICC-02/04-01/05, 16 September 2009, para. 47; and, *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled “Decision on the Admissibility and Abuse of Process Challenges”, ICC-01/05-01/08, 19 October 2010, paras. 100-101). This issue has thus been dealt with in the Government’s appeal to the Appeals Chamber. The Government made two applications, one for a “Status Conference” and another for an “Oral Hearing”.

Assistance (which is the subject of the present application). The Government of Kenya's primary submission is that no leave is required to have the error in respect of the Request for Assistance heard by the Appeals Chamber as part of the appeal against the Admissibility Decision. The Government of Kenya only files this application for leave in case the Appeals Chamber decides that it cannot consider this particular procedural error as part of the appeal against the Admissibility Decision.

4. The Pre-Trial Chamber is thus asked to grant leave to appeal on this procedural issue only, there being a proper basis to do so under Rule 82(1)(d) in that it is an issue that would significantly affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeal Chamber may materially advance the proceedings.⁵

B. Submissions

5. The Government of Kenya's submission is that the Pre-Trial Chamber erred in holding that there was no link between the Government's Admissibility Application and its Request for Assistance to justify deciding the Request before the Application.
6. First, the Government of Kenya *did* state in its Application that receiving assistance from the Prosecutor was directly relevant and related to its Application. At para. 17 it is stated that "The Government hopes the Prosecutor may share the outcome of his investigations to date with the appropriate Kenyan authorities in order to assist the Kenyan investigations. The Government will be enthusiastic in exploring ways in which the Prosecution could continue to co-operate with the Kenyan authorities in the future."⁶ At para. 73 the Government of Kenya said that it would report to the Chamber on "the progress made with seeking ways to co-operate with the ICC

"Status Conferences" and "Oral Hearings" are quite different proceedings. As the Government explained in para. 20 of its Admissibility Application, an oral hearing was requested to deal with the substance of its Application on account of the Application raising issues of such great importance to Kenya and its citizens. A Status Conference was requested for the *procedure* of the Application as a whole to be determined. There was no uncertainty in the mind of the Government that it had requested a Status Conference to be followed after the procedure had been agreed and filings had been made by an Oral Hearing on the merits of the Application. The Government understands how it is now said by the Chamber that the word 'Accordingly' at the start of paragraph 21 of the Application may have allowed the Chamber to conceive of an identity of concept in the terms "oral hearing" and "status conference". However, the suggestion that the Government and its lawyers have in any way acted in bad faith is simply wrong. An oral hearing on the merits would have permitted the Government to provide the concrete details of the investigation that the Chamber found, by asserted omission, was the very reason for refusing the Government's admissibility challenge.

⁵ As provided for in Article 82(1)(d).

⁶ Government's Admissibility Application of 31 March 2011, para. 17.

Prosecutor, assuming this is acceptable to him, for the transmission of the results of his investigations to the national authorities to assist in their investigations”.⁷ Government representatives met with the Prosecutor shortly after filing the Admissibility Application to request his assistance, and only filed the Government’s Request for Assistance after no such assistance was forthcoming. It is wrong to criticise the Government of Kenya when it did raise the issue at the earliest opportunity and when it did immediately pursue the matter. The Government of Kenya has maintained from the outset that the receipt of the Prosecutor’s evidence would assist its national investigation and use of the evidence thereafter in investigations would reflect or manifest the Government of Kenya’s intention to try all cases in its national courts.

7. Second (the conceptual point referred to in paragraph 2 above), the Government of Kenya never suggested that its Request for Assistance was *procedurally* linked under the Statute, Rules or Regulations to its Admissibility Application. The Government of Kenya’s argument was one of a *substantive* connection, namely, that it is most sensible and efficient to decide *first* whether the Government of Kenya would receive the Prosecutor’s evidence. Were the Chamber to have considered that the Government of Kenya’s request was a reasonable one and should be granted, the Government of Kenya would have had access to potentially important evidence against the six Suspects which it may not have been able to obtain in any other way. There is nothing in the Statute, Rules or Regulations preventing the Chamber from having proceeded in this way and, as the Chamber itself has held, Rule 58 provides the Chamber with a wide discretion to determine the procedure for the proceedings that best suits the circumstances of the case. There would appear to be no good reason to have delayed such a decision until after the decision declaring the cases admissible. It would be unfair to have denied the Government of Kenya the opportunity to rely on such evidence in its national investigations and to the deny its use of the evidence in its admissibility challenge and it could cause unnecessary delays in the proceedings should the Government of Kenya have to launch a fresh challenge to admissibility on receiving the Prosecutor’s evidence.

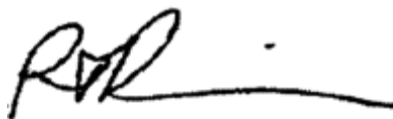
8. The Chamber’s decision to refuse to decide on the Request for Assistance before the Admissibility Decision, therefore, involves an issue that will significantly affect the

⁷ Government’s Admissibility Application of 31 March 2011, para. 73, and see para. 79(i).

fair and expeditious conduct of the proceedings. Furthermore, an immediate resolution of this issue by the Appeal Chamber may materially advance the proceedings. Were the Appeals Chamber to decide that the Pre-Trial Chamber had committed a procedural error, it could overrule the Admissibility Decision itself, or alternatively it could direct the Pre-Trial Chamber to decide on the Request for Assistance and then to reconsider the Government's Admissibility Application. In this way the proceedings could be materially advanced by ensuring that potentially important evidence from the Prosecutor is taken into account in the final determination of admissibility, and that no unnecessary delays in the proceedings are occasioned by the Government of Kenya having to make a new admissibility application in light of its request for assistance being granted (which could again have to be considered on appeal by the Appeals Chamber).

C. Conclusion

9. For these reasons the Government of Kenya respectfully requests the Pre-Trial Chamber to grant leave to appeal its procedural finding on the issue of the Government's Request for Assistance. This application is made without prejudice to the Government of Kenya's primary submission in its appeal to the Appeals Chamber that this procedural matter can be considered in any event, in accordance with established ICC jurisprudence, as part of the appeal without the leave of the Pre-Trial Chamber.



Sir Geoffrey Nice QC
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Dated 6th June 2011

London, United Kingdom