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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 MOHAMED HUSSEIN ALI

Public Document

Response to Government of Kenya's Application for Leave to Appeal Alleged Procedural Error In Relation to Decision on Admissibility

Source: **Office of Public Counsel for Victims**

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

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INTRODUCTION

1. The Government of Kenya's request for leave to appeal the admissibility decision on the basis of the alleged "procedural error" should be denied. The Government never suggested – nor could it logically have claimed – that disclosure by the OTP was a prerequisite to the commencement of its own investigations. The supposed "procedural error" for which leave to appeal is sought is therefore irrelevant to the Chamber's determination of the admissibility application, and immediate resolution thereof would serve no purpose whatsoever.

2. The request is also premature, inviting the Pre-Trial Chamber to make a ruling based on a potential determination by the Appeals Chamber.

PROCEDURAL HISTORY

3. On 31 March 2011, the Government requested that the present case be declared inadmissible on the basis that it immediately would,[1] or already had,[2] started investigations into the case.[3] The request was denied by the Pre-Trial Chamber on 30 May 2011, on the ground that the Government had not "explain[ed] or show[n] the Chamber any concrete step that has been or is being currently undertaken" to investigate the three suspects.[4] Hence, the first prong of Article 17(1)(a) – requiring that a case "is being investigated or prosecuted" by the State –

[1] "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute", No. ICC-01/09-02/11-26, 31 March 2011, ("Admissibility Application") para. 13 ("As the processes of reform and the investigations of crimes will continue over the coming months, the Application also outlines in Part E below the steps that are being and will be undertaken").
[2] *Idem*., para. 12 ("the investigative processes that are currently underway"), para. 46 ("the investigative processes that are underway").
[3] *Ibidem*., paras. 79-80.
[4] "Decision on the Application of the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", No. ICC-01/09-02/11-96, 30 May 2011, para. 64.

was not satisfied, obviating the need to consider the genuineness of the investigation.[5]

4. While the admissibility application was pending, the Government filed, on 21 April 2011, a "Request for assistance" seeking the "transmission of all statements, documents, or other types of evidence obtained by the Court and the Prosecutor" in relation to Post-Election Violence.[6] The Government again insisted that it was already "conducting an investigation at all levels in respect of all persons" alleged to have been involved in the post-election violence, but that the information would "advance its national investigations … including those in respect of the six suspects who are presently before the ICC."[7]

5. The Government has appealed, as is its right, the Chamber's decision on admissibility.[8] It now also seeks leave from the Pre-Trial Chamber to appeal what it describes as a "procedural error" within the admissibility decision: the failure to have resolved the "Request for assistance" before determining the admissibility request.[9]

APPLICABLE LAW

6. Leave to file an interlocutory appeal is only to be granted, pursuant to Article 82(1)(d) of the Rome Statute, where:

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[5] *Idem.*, para. 66.
[6] "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194", 21 April 2011, No. ICC-01/09-58, para. 2.
[7] *Idem.*, paras. 3-4.
[8] "Appeal of the Government of Kenya against 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", 6 June 2011, No. ICC-01/09-02/11-104.
[9] "Government of Kenya's Application for Leave to Appeal a Procedural Error in the 'Decision on 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'", 6 June 2011, No. ICC-01/09-02/11-105.

(a) the decision involves an "issue" that would significantly affect (i) both the fair an expeditious conduct of the proceedings (ii) or the outcome of the trial; and

(b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.[10]

SUBMISSIONS

7. The supposed "procedural error" – as it is characterized by the Government – had no causal impact on the Chamber's determination of the admissibility request. The Chamber rejected the request on the basis that *no* investigations were underway, not that any such investigations were qualitatively inadequate. The information sought by the Government was not a prerequisite to commencing investigations, and it never claimed otherwise. On the contrary, the Government insisted that investigations into the three defendants in this case were already underway[11] despite not possessing the information in question. The most that can be said, on the basis of the Government's own submissions, is that the information would have facilitated its investigation.

8. The only reason cited by the Government for seeking the information in advance of the admissibility decision was that the absence of the information could "be a means to belittle the Government's investigations."[12] In the result, the Chamber did not "belittle" investigations that were underway in its reasoning; it simply found

[10] "Decision on the Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (ICC-01/09-02/11-48)", 2 May 2011, No. ICC-01/09-02/11-77, para. 7.

[11] "Reply on Behalf of the Government of Kenya to the Responses of the Prosecutor, Defence and OPCV to the Government's Application pursuant to Article 19 of the Rome Statute", 13 May 2011, No. ICC-01/09-02/11-91, paras. 30-31 ("The Government of Kenya made clear in its Application and supporting Annexes that an investigation, including into the six suspects, was presently underway…. There has been an investigation underway by the Kenyan authorities which covered the six suspects since shortly after the Post-Election Violence; the six suspects are presently the focus of the investigation.")

[12] "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194", 21 April 2011, No. ICC-01/09-58, para. 7.

that no such investigations had been undertaken at all. The information in question was not a prerequisite to the steps that could have been taken by the Government to investigate the case. The alleged procedural misstep was, accordingly, irrelevant to the Chamber's reasoning.

9. The Government argued during the briefing of the assistance request that the Prosecution's response contained "highly prejudicial" allegations to which it should be entitled to respond:

> No decision on the Admissibility Application should be finally determined before the Government's reply to the Prosecutor's Response of 10 May 2011 is submitted to the Chamber for consideration.[13]

10. This submission implicitly conceded that the assistance request did not need to be resolved before the admissibility request, seeking only that no decision be rendered until a reply could be submitted. The Chamber, incidentally, relied on none of these allegedly "prejudicial" allegations in reaching its conclusion that no national investigations were underway in Kenya.

11. The assistance request, in short, was wholly unrelated to the Chamber's reasoning and ultimate findings in rejecting the admissibility request. It does not even reach the threshold requirement of being an "issue … the resolution of which is essential for determination of matters arising in the judicial cause under examination."[14] Appellate resolution of the alleged procedural fault would have zero impact on the correctness of the Pre-Trial Chamber's reasoning and conclusion, much less on the fair and expeditious conduct of proceedings. An interlocutory appeal on

[13] "Reply on Behalf of the Government of Kenya to the Responses of the Prosecutor, Defence and OPCV to the Government's Application pursuant to Article 19 of the Rome Statute", 13 May 2011, No. ICC-01/09-02/11-91, para. 4.
[14] "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, No. ICC-01/04-168, para. 9.

this question, rather than materially advancing the proceedings, would be a waste of judicial resources.

12. Further, the Government concedes that the present leave request only has relevance "in case" the Appeals Chamber adopts a particular approach to the appeal of substance.[15] Hypothetical questions are not appropriate for judicial determination, particularly when already pending before the Appeals Chamber.

Christopher Gosnell
Counsel

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

[15] "Government of Kenya's Application for Leave to Appeal a Procedural Error in the 'Decision on 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'", 6 June 2011, No. ICC-01/09-02/11-105, para. 3.