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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

Application on behalf of the Government of Kenya for leave to reply to responses, filed on 28 April 2011, to Application challenging admissibility in light of the responses as filed and of no decision being rendered in respect of the Government of Kenya's filing of 11 April 2011 requesting a direction on its right to reply

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 files this application for leave to reply to the responses filed on 28 April 2011 to the Government's Application of 31 March 2011 challenging the admissibility of the two cases presently before the ICC. The Government submits that it must be given until 30 May 2011 to file its reply, in light of up-to-date information on its national investigations that it *must* provide (as explained below, see paras. 15-18) and in light of other matters set out below.
2. On 11 April 2011 the Government of Kenya sought a direction from the Pre-Trial Chamber pursuant to Rule 58 to reply to the parties' observations once they were to be filed on 28 April 2011.¹
3. In this filing the Government submitted that the Pre-Trial Chamber should confirm the Government's right of reply under the wide discretionary powers granted to the Chamber under Rule 58 for determining the proper and fair procedure to be followed in dealing with applications under Article 19 (there being no need to assume a Chamber should be bound by the Regulations, which must be read subject to the Rules, as provided in Regulation 1). This remains the Government's primary submission. However, as the Chamber has not yet ruled on this filing, and given that responses of the parties have now been filed that raise substantial and significant questions of law and fact, the Government files the present application pursuant to Regulation 24(5) to preserve its position and to ensure that it has sufficient time to file its reply.
4. The Prosecutor supports the Government's request to reply. On 21 April 2011 the Prosecutor filed his response to the Government of Kenya's filing of 11 April 2011 in which he supported the Government's request to reply, including in order to "update the Chamber on the status of the investigation since the time the original admissibility application was filed."² In addition, the Prosecutor noted that as "this is the first time

¹ See Motion on Behalf of the Government of Kenya for Direction to Confirm the Right of the Government of Kenya to Reply to Observations Submitted by the Prosecutor, Defence and OPCV Pursuant to the Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 11 April 2011.

² Prosecution Response of 21 April 2011, para. 3.

this Court has considered a challenge brought by a State Party to admissibility”, the State should be allowed “additional deference ... in this circumstance.”³

B. Submissions

The Government of Kenya must be permitted a reply

5. As set out in the Government’s filing of 11 April 2011⁴, the Government’s primary submission is that the Chamber can, under Rule 58, confirm that the Government can reply and can, and should, set an appropriate and fair deadline in the circumstances for doing so.
6. Rule 58 provides the Chamber with a wide discretion to “decide on the procedure to be followed” and the “appropriate measures for the proper conduct of the proceedings”.⁵ As held by the Chamber, this Rule bestows the Chamber “with the necessary discretion to organise the proceedings related to an admissibility challenge in a manner that best suits the circumstances of each particular case”.⁶ Given:
 - the fundamental and seminal questions raised by the Government’s Application under Article 19,
 - the complexity of the legal and factual issues involved,
 - the vital importance of the Application both to the ICC and the Government of Kenya and its people, and
 - that the Government’s national investigations, including into the six suspects presently before the ICC, which are or may be central to the Application, are progressing,

it is clearly essential that the Government be allowed to reply to the responses as filed.

As noted above, the Prosecutor recognises that, in the unique circumstances of the

³ Prosecution Response of 21 April 2011, para. 3. The Prosecutor has indicated that the Government should be given 10 days to reply and that “any variation in the time frame should only be granted if the Chamber is satisfied good cause has been shown” (para. 4). It should also be noted that on 18 April 2011 the Office of Public Counsel for Victims (OPCV) filed its Response to the Government of Kenya’s filing of 11 April 2011 in which it did not oppose a reply in principle, but emphasised *inter alia* that the Government’s filing was premature and should be brought under Regulation 24(5) as an application for leave to reply.

⁴ Government Motion of 11 April 2011, para. 8 and fnt. 4.

⁵ See Rule 58(2).

⁶ Decision of 4 April 2011, para. 8.

present Application, the Government *should* be permitted a reply. A fair outcome to these proceedings requires that the Government be permitted to reply within an appropriate and reasonable time.⁷

7. No decision has been rendered by the Chamber on the Government's filing of 11 April 2011. The Chamber should grant this motion under Rule 58 as originally sought, or in the alternative, grant leave to the Government to reply pursuant to Regulation 24(5). There are numerous issues raised in the responses of the parties filed on 28 April 2011, particularly those of the Prosecutor and the OPCV that the Government, as the Applicant, *must* be entitled to reply to and on which it should have the final word. The opportunity to reply will provide procedural fairness by ensuring that the Government can respond to allegations made against it in the responses and that all relevant arguments and information are before the Chamber to avoid a final decision being based on incomplete information.

8. Three main issues raised in the responses require a reply. First, the responses of the Prosecutor and the OPCV assert that the Government has not demonstrated in its Application that there is currently a national investigation underway in respect of the six suspects.⁸ The Chamber is invited by the Prosecutor to reject the Government's Application on this basis alone. The Prosecutor claims that the investigation against the six suspects is "still merely hypothetical"⁹. These assertions are wrong. The Government will provide the Chamber with the most up-to-date information on the nature and extent of the national investigation. The Government has already provided information in the Application and the Annexes to the Application¹⁰ about this investigation, and has made absolutely clear that the investigation was, and is, progressing. The Government must be permitted a reply to rebut the Prosecution's allegation, as well as the assertion by the OPCV, that there is no investigation underway. In this regard, the Government must also be permitted an opportunity to explain in its reply why the Annexes to its Application should all be taken into

⁷ Government Motion of 11 April 2011, paras. 4-5.

⁸ For example see Prosecution Response of 28 April 2011, para. 13; OPCV Response of 28 April 2011, para. 2.

⁹ Prosecution Response of 28 April 2011, para. 25.

¹⁰ See, for example, Application of 31 March 2011, paras. 4, 13, 26, 32, 33, 34, 35, 36, 46, 66, 69, 70, 71, and 79; and, Filing of Annexes of Materials to the Application of the Government of Kenya pursuant to article 19 of the Rome Statute, 21 April 2011, paras. 2-12.

consideration by the Chamber to rebut the Prosecutor's argument that they should be rejected.¹¹

9. In seeming contradiction to this argument, the Prosecutor has acknowledged that the Government should be permitted in its reply to provide the Chamber with the most "updated" information on the status of the investigation.¹² There is no basis at all on which the Government should be barred from filing all current evidence and information on the state of the national investigation to support its Application under Article 19 as a State Party claiming sovereign jurisdiction, especially in light of false assertions made by the Prosecution and the OPCV. Kenya is not a failed State but a ratifying party of the ICC that participated in the process leading to the Rome Statute. It is entitled to respect and, at this stage, that must mean that it is afforded enough time to make its arguments and to provide evidence to support its claim to investigate and to try its own citizens.

10. Further, the Government must reply to the Prosecution's suggestion that its Application has the effect of unduly delaying the proceedings.¹³ The proper interpretation of Article 19 and the steps that are being taken by the Government to conclude, as expeditiously as possible, its investigations are crucial matters that the Government must be permitted to address in its reply.

11. Second, the OPCV in its response suggests that even if the Government is investigating the six suspects, it has not shown that those investigations are "genuine".¹⁴ This response argues that there are various indicators to support its assertion. The Government must reply to the indicators relied upon by the OPCV. It is suggested by the OPCV that the reforms explained in the Application are inadequate to ensure a genuine investigation and, in particular, that the Application does not address police reforms.¹⁵ Very serious allegations are leveled against the Kenyan criminal justice system, including how "forces" will "work against the far less independent structures of the existing criminal justice system".¹⁶ These are grave criticisms to which the Government must be given a fair opportunity to reply in order

¹¹ Prosecution Response of 28 April 2011, para. 23.

¹² Prosecution Response of 21 April 2011, para. 3.

¹³ Prosecution Response of 28 April 2011, para. 21.

¹⁴ OPCV Response of 28 April 2011, para. 19.

¹⁵ OPCV Response of 28 April 2011, para. 30.

¹⁶ OPCV Response of 28 April 2011, paras. 31-34.

to demonstrate that its investigations are indeed genuine and that its police and criminal justice systems are equipped to conduct the necessary investigations and prosecutions.

12. In addition, the Government must reply to the allegation by the OPCV that there have been “extensive” delays in the Kenyan investigations.¹⁷ The OPCV assertions on this topic are made alongside an argument that the conditions for inadmissibility are to be determined according to “objective criteria”.¹⁸ As noted below, this legal argument (together with the associated factual allegations) are significant matters that have been raised in the responses to which the Government must reply, and which justify the granting of leave to reply.

13. Third, the responses raise fundamental legal questions about the interpretation of Article 17 of the Statute, specifically on the meaning and scope of the terms “investigated” and “case” within Article 17.¹⁹ The applicability of the “same person and same conduct” test is examined in the responses and new arguments are raised by some of the parties.²⁰ Further, various legal issues pertaining to the cornerstone principle of complementarity and, in particular, the interpretation of “unwillingness”, have been raised in the responses.²¹ The Government must be allowed to reply to these legal arguments, certain of which are new.

14. These are all legal matters of complexity that go to the criteria to be applied by the ICC in deciding admissibility challenges raised by States Parties. As this is the first time the ICC has considered an admissibility challenge by a State Party, there is no definitive jurisprudence. As acknowledged by the Prosecutor, although these issues have arisen in other contexts they have not been decided by the Appeals Chamber.²² The Government of Kenya must therefore be provided with the opportunity to reply to all of the legal arguments raised by the parties which were not addressed, or not considered in full, or not forecast in the Application and will take considerable time and research properly to prepare.

¹⁷ OPCV Response of 28 April 2011, paras. 41-45.

¹⁸ OPCV Response of 28 April 2011, para. 42.

¹⁹ Prosecution Response of 28 April 2011, paras. 13, 15, 17, 18, 19; OPCV Response of 28 April 2011, paras. 1, 9, 11, 12, 14, 18; and, Ruto and Sang Response of 28 April 2011, paras. 5-14.

²⁰ For example, see Ruto and Sang Response of 28 April 2011, paras. 5-14.

²¹ OPCV Response of 28 April 2011, paras. 20, 21, 22, 23, 33, 42, 43; and, Ruto and Sang Response of 28 April 2011, paras. 15-25.

²² Prosecution Response of 28 April 2011, fn. 27.

The Government of Kenya must be granted until 30 May 2011 to reply to the responses of the parties

15. In its filing of 11 April 2011, the Government of Kenya submitted that it would require until 30 May 2011 to reply and that the Chamber should grant the Government that period of time pursuant to its broad powers under Rule 58.²³ The Government reiterates this submission and, in addition, requests that, to the extent necessary, the Chamber adjust the time limit for the filing of the Government's reply from 10 days (as provided in Regulation 34(c)) to 28 days (i.e. until 30 May 2011) pursuant to Regulation 35, there being good cause to do so. The Government cannot reasonably be expected to provide a detailed up-to-date report on the status of its investigations, including into the six suspects, in a few days. Information from various sources needs to be gathered, reviewed and summarised. It will also need to be determined what information can be made public and whether information may need to be filed confidentially or *ex parte*. In order to provide a comprehensive "update" to assist the Chamber, the Government will require until 30 May 2011.

16. Moreover, the Government has, on 21 April 2011, requested the Prosecutor to provide it with the results of his investigations into Post-Election violence, including in respect of the six suspects. It must be borne in mind that the Government of Kenya has never had sight of, or access to, the evidence underlying the Waki and similar reports and has, to date, been refused access by the ICC Prosecutor to the material he may hold pointing towards culpability of the six suspects. This history may prove to be a critical element in the Admissibility Application when finally resolved. Material held by the Prosecutor - if ever provided to the Government of Kenya - may have a significant impact on the Government's current investigations and may be material that will need to be reflected in the further information and reports to be provided to the Chamber.

17. Furthermore, in order to respond to the various allegations made by the OCPV about the genuineness and willingness of the Government of Kenya to investigate the individuals before the ICC, the Government will need to provide further information about its investigative and judicial processes. This is an undertaking that cannot be

²³ Government Motion of 11 April 2011, para. 3 and fnt. 1.

properly completed in a few days. As a State Party, the Government of Kenya can see no reason for not being provided with the time it has requested in order for it to deal with all matters relevant to its Application. This is a very important proceeding before the ICC for the Government of Kenya. The Government should be afforded the time it has requested, which is a reasonable period in the circumstances, to place all information before the Chamber that it deems essential for the fair determination of its Application.

18. There is no prejudice or delay caused to the proceedings by granting the Government until 30 May 2011 to reply. As the Pre-Trial Chamber has ruled, the present admissibility proceedings do not affect the Prosecution's disclosure obligations and a clear disclosure timetable has been set for both cases presently before the ICC.²⁴ The granting of an extension of time until 30 May 2011 will not hamper in any way the preparations that are continuing in each of the cases before the ICC. The fact that proceedings are continuing before the ICC should not provide a reason for curtailing the right of the Government to have adequate time to submit all relevant and current information before the Pre-Trial Chamber.

C. Conclusion

19. For these reasons, the Government of Kenya respectfully requests:

- (i) The Chamber to confirm that the Government can reply by 30 May 2011 pursuant to its broad powers under Rule 58, as originally sought;
- (ii) Alternatively, now that the responses have been filed, the Chamber to grant leave to the Government to reply pursuant to Regulations 24(5) and 35 by 30 May 2011.

²⁴ See *Prosecutor v. Ruto, et al.*, ICC-01/09-01/11, Decision on the "Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge" and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011; and, *Prosecutor v. Muthaura, et al.*, ICC-01/09-02/11, Decision on the "Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge" and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011.



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Dated 2nd May 2011
London, United Kingdom