

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 5 May 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  
PROSECUTOR *v.* FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA  
and MOHAMMED HUSSEIN ALI**

**Under Seal  
Ex parte, Prosecution only**

**Submission on behalf of the Government of Kenya in respect of Request for  
Cooperation**

**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:

**The Office of the Prosecutor**

Luis Moreno-Ocampo, Prosecutor  
Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of the Applicant**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

Sir Geoffrey Nice QC  
Rodney Dixon

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Silvana Arbia, Registrar  
Didier Preira, Deputy Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**A. Procedural history**

1. On 8 March 2011 the Pre-Trial Chamber by a majority decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali to appear before the ICC on 7 April 2011.
2. On 21 March 2011, the Single Judge issued the “Decision Requesting Information and Observations from the Prosecutor” in which she requested the Prosecutor to submit observations and information in his possession concerning the nature and whereabouts of financial assets and properties belonging to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali.
3. On 25 March 2011 the Prosecutor filed his response to the 21 March decision wherein he provided information about the assets and properties which can allegedly be linked to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali.
4. Judge Ekaterina Trendafilova, the Single Judge, by a decision of 5 April 2011 ordered the Registrar to prepare and transmit, in accordance with Article 87(2) of the Statute and Rule 176(2) of the Rules and in consultation with the Prosecutor, a request for cooperation to the competent authorities of the Republic of Kenya for the purposes of identifying, tracing and freezing or seizing the property and assets belonging to or under the control of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali, without prejudice to the rights of *bona fide* third parties. The Judge ordered that the Registrar should include in the request for cooperation a provision requesting the competent authorities of the Republic of Kenya to inform the Registrar every two months of any seizure of property and freezing of assets carried out in execution of this decision, and that the Registrar report any such information to the Chamber as soon as possible.
5. Following this decision the Registrar by an Urgent Confidential communication of 8 April 2011 made the request to the Kenyan authorities to assist the Court in identifying, tracing, freezing or seizing any or all property and assets held directly and/or indirectly on behalf of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali, and requested a first report to inform the Chamber of the status of execution of the request by 6 June 2011.

6. By letter dated 14 April 2011 to the Registrar, the Attorney-General of the Republic of Kenya acknowledged the said communication and request but exercised the right of postponement of the execution of the request to wait the determination of the Government of Kenya's admissibility challenge by the Court.
7. By letter of 15 April 2011 the Registrar notified the Ambassador of the Republic of Kenya to the Kingdom of the Netherlands of a request by the President of the Pre-Trial Chamber to file a motion to present the observations contained in the Attorney-General's letter under seal and *ex parte*.

**B. Law**

8. The Government of Kenya recognises that the ICC has power under Article 57 of the Rome Statute where a warrant of arrest or a summons has been issued under Article 58 to seek the cooperation of States pursuant to Article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.
9. The Government of Kenya further recognises its duty under Article 87 (3) and (7) of the Rome Statute to keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request and that where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties.
10. The Government of Kenya further acknowledges its duty pursuant to Article 88 of the Rome Statute to ensure that there are procedures available under their national law for all relevant forms of cooperation as specified.
11. With these obligations in mind the Government of Kenya is further aware of its duty under Article 93(k) of the Rome Statute to comply with requests by the Court to provide assistance in relation to investigations or prosecutions by the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities

of crimes for the purpose of eventual forfeiture, without prejudice to the rights of *bona fide* third parties.

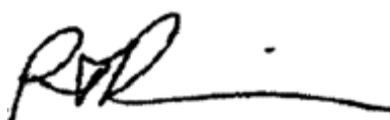
12. However, the Government of Kenya is also aware of its rights under Article 95 of the Rome Statute that where, as here, there is an admissibility challenge under consideration by the Court pursuant to Article [18 or] 19, it may postpone the execution of a request under this Part of the Statute pending a determination by the Court (“unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19” - irrelevant in this case as there has been no such order and the request is not one for the collection of evidence).

### C. Submissions

13. The Government of Kenya has already made clear its intention to exercise this right under Article 95 and is postponing execution of the request.
14. The laws of the Republic of Kenya are consistent with the provisions of the Rome Statute and postponement of the request as asserted by the Government of Kenya is lawful.
15. Section 106 of the *International Crimes Act* 2008 states that where the ICC requests assistance under paragraph 1(k) of Article 93 of the Rome Statute in identifying, tracing and freezing or seizing, any property for the purpose of eventual forfeiture, the Attorney-General shall give authority for the request to proceed if he is satisfied that: (a) the request relates to an international crime that is being investigated by the Prosecutor, or which is the subject of proceedings before the ICC; and (b) the property concerned is or may be located in Kenya.
16. Under Section 107 of the same Act if the Attorney-General gives authority for the request for assistance in identifying, tracing and freezing, or seizing, property to proceed, he may authorise the appropriate Kenyan authority to apply for one or more of the following orders or warrants (a) a search warrant in respect of property under Part B of the Second Schedule; (b) a restraining order under Part C of the Second Schedule; (c) a production order under Part D of the Second Schedule; or (d) a monitoring order under Part E of the Second Schedule.

17. However, by Section 110 (1) of the Act the Attorney-General may postpone the execution of a request for assistance if, and only if: (a) the execution of the request would interfere with an ongoing investigation or prosecution for a different offence and Section 112 applies; or (b) a ruling on admissibility is pending before the ICC and Section 113 applies.
18. Also under Section 110 (2) of the Act even if a case is one to which subsection (1) applies, the Attorney-General may decide not to postpone the execution of the request, and if the Attorney-General postpones the execution of a request for assistance under this Part, the postponement may be for a reasonable time and may, if the Attorney-General considers it desirable, be extended from time to time.
19. Section 113 (1) of the Act applies if the ICC is considering an admissibility challenge under Article 18 or Article 19 of the Rome Statute in respect of a case that a request to which this Part applies relates. By Section 113 (2) of the Act if the ICC has not made an order under Article 18 or Article 19 of the Rome Statute allowing the Prosecutor to collect evidence to which the request relates, the Attorney-General may postpone the execution of the request until the ICC's determination on admissibility is issued. By Section 113 (5) of the Act if the ICC determines that the case to which the request relates is admissible, and there is no other ground for refusing or postponing the request, the request shall continue to be dealt with.
20. By Section 116 of the Act at any time before a formal response is sent to the ICC, the Attorney-General may decide that a request by the ICC for assistance to which this Part applies will be refused or the execution of the request postponed, on a ground specified in Section 109 or Section 110, even if he has previously given authority for the request to proceed.
21. Exercise of postponement in these circumstances is a right and not a decision from which any inference - adverse or otherwise - can be drawn against the Government of Kenya. Its exercise is not something that could properly be considered by the Pre-Trial Chamber when deciding on the timetable or other issues connected with the Government's admissibility challenge.

22. The Government of Kenya reminds the Pre-Trial Chamber that the Government has never been provided with the material - whether formally capable of being evidence or not - that lies behind the Waki Report or other similar reports. The Government has since requested access to the results of all the ICC Prosecutor's inquiries into the Kenyan 2007/8 post-election violence (including in relation to the six suspects presently before the ICC) by a Request for Assistance filed on 21 April 2011 to which the Prosecutor has not yet responded.



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Sir Geoffrey Nice QC  
Rodney Dixon  
Counsel on behalf of the Government of the the Republic of Kenya

Dated 5<sup>th</sup> May 2011  
London, United Kingdom