Cour Pénale Internationale

International Criminal Court

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

Date: **26 July 2011**

IN THE APPEALS CHAMBER

Before: **Judge Daniel David Ntanda Nsereko, Presiding Judge**
Judge Akua Kuenyehia
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI

Public Document

Response on behalf of the Government of Kenya to the "Victims Observations on the Government of Kenya's Appeal Concerning Admissibility of Proceedings"

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 hereby submits its Response to the "Victims Observations on the Govenernment of Kenya's Appeal Concerning Admissibility of Proceedings" (the "Victims Observations of 19 July 2011") filed by the Office of Public Counsel for Victims ("OPCV") on 19 July 2011.

2. The Government of Kenya files this Response pursuant to the order of the Appeals Chamber issued on 13 June 2011, which allowed the parties, including the Government of Kenya, to file a response to the OPCV's observations within seven days of notification of the OPCV's observations.

3. The OPCV's main argument is that there is no investigation of the six Suspects currently taking place in Kenya. It merely repeats the argument that has been advanced by the Prosecution without adding anything of any significance. The OPCV supports the Pre-Trial Chamber's decision on the factual issues as being reasonable. The OPCV also asserts that no procedural errors were committed, that the Chamber correctly defined the meaning of "case" as a matter of law, and that the Government of Kenya's latest Report on the investigation should be rejected. In all of these arguments the OPCV fails to address the central question: whether the Government of Kenya's unambiguous submission to the ICC that it is investigating the six Suspects for crimes allegedly commited during the Post-election Violence is simply untrue?

4. The Government of Kenya has, of course, been completely straightforward with the ICC from when it first filed its challenge to admissibility. The Government of Kenya has never claimed that its investigation into the six Suspects is complete. It has reported each step of the way on what concrete actions have been taken in the investigation. The report of 1 July 2011 (filed on 4 July 2011) provides an update on this investigation. The OPCV cannot seriously be suggesting in light of this Report that the Government of Kenya is *not* investigating the six Suspects. The Suspects are currently being interviewed by the Kenyan Police. Perhaps that is why the OPCV opposes the admission of the Report. The OPCV has no answer to the fact that the Report clearly proves that an investigation is taking place.

5. The Government of Kenya sets out its response to the OPCV's observations below. None of these observations provide any basis at all to uphold the Pre-Trial Chamber's Decision on appeal.

B. Procedural History

6. On 6 June 2011, the Government of Kenya filed the "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'" (the "Appeal Notice of 6 June 2011") in which the Government of Kenya submitted that the Pre-Trial Chamber erred in procedure, in fact and in law in its Admissibility Decision of 30 May 2011.

7. On 13 June 2011, the Appeals Chamber decided that the victims, represented by the OPCV, could submit observations in respect of the Appeal to be filed seven days after notification of the Prosecution and Defence Responses to the Appeal. The Appeals Chamber directed that the parties, including the Government of Kenya, could file responses to these observations within seven days.[1]

8. On 20 June 2011, the Government of Kenya filed the "Document in Support of the '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'" (the "Document in Support of Appeal of 20 June 2011").

9. The Prosecution filed its Response to the Appeal on 12 July 2011. The following suspects filed their responses on 12 July 2011: Mr. Ali, Mr. Ruto and Mr. Sang, and Mr. Kosgey.

10. On 14 July 2011, the Appeals Chamber directed the suspects to file "any observations as to whether the Appeals Chamber should accept or should dismiss in limine" the updated investigation Report of 1 July 2011 by 19 July 2011.[2] On 15 July 2011, the Defence for Mr. Ali submitted its observation in support of the Appeals Chamber

[1] Appeal Chamber's Decision of 13 June 2011.
[2] Order on the filing of observations in relation to the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility", 14 July 2011.

accepting the Report and on 19 July 2011 the Defence for Mr. Ruto and Mr. Sang, as well as Mr. Kosgey filed observations supporting the acceptance of the Report.

11. On 19 July 2011, the Government of Kenya filed its Application for Leave to Reply to the Prosecution's Response.

12. On 19 July 2011, the OPCV submitted the "Victims Observations on the Government of Kenya's Appeal Concerning Admissibility of Proceedings" in accordance with the Appeals Chamber's order of 13 June 2011.

C. Factual errors: an investigation is taking place

13. The OPCV's observations support the "[t]he Chamber's ultimate finding of fact - that no investigation had been shown to be ongoing against the defendants."[3] The OPCV is critical of details of the filings made by the Government of Kenya (which it labels "ambiguous") and their timing. The failing of the OPCV's submission is that it does not directly address whether it accepts that an investigation is actually on-going. The whole point of the admissibility challenge is to determine whether an investigation is taking place in respect of the "case" before the ICC. The OPCV does not constructively contribute to the resolution of this issue by refusing at any cost to acknowledge that a national investigation into the six Suspects is underway in Kenya. The OPCV does not say whether it still regards the Government of Kenya's submissions as "ambiguous" when the Kenyan police are currently interviewing the Suspects as part of the national investigation (see further Part D below).

14. Instead, the OPCV dissects each of the Government of Kenya's statements and reports about the national investigation to seek to show that the Pre-Trial Chamber's decision was reasonable. None of these arguments shows that an investigation into the six Suspects is in fact not presently underway. The OPCV does not argue that the investigation is not genuine or is an attempt to shield any of the Suspects from prosecution before the ICC.

15. The OPCV focuses on the wording of statements and reports made by the Attorney General, the Commissioner of Police, the Director of Criminal Investigations, and the

[3] Victims Observations of 19 July 2011, para. 7.

Public Prosecutor. The OPCV stops short of claiming that these statements are untrue. Either the six Suspects are being investigated by the Kenyan authorities for the crimes that allegedly occurred during the Post-Election Violence or they are not. In the submission of the Government of Kenya, the OPCV's observations provide little, if any, assistance in that they do not take a clear position on the issue in dispute. If the statements of the Government of Kenya are correct that they are investigating the six Suspects, as they plainly are, logically there is no basis at all to claim "inactivity". The OPCV should then be focusing its attention on whether the investigation itself meets the standards required under Article 17, which the OPCV has not done. If the OPCV opposes the six Suspects being tried in Kenya, it should say so and give its reasons, instead of quibbling over the wording or timing of evidence provided by the Government of Kenya (or whether the annexes were too long!).

16. The Government of Kenya's efforts to inform the ICC of the national investigation are also criticised by the OPCV. It submits that the Government of Kenya "apparently believes" that it is entitled "to submit information as and when it sees fit, regardless of any deadlines or procedural rules, including even throughout the appeal proceedings."[4] This argument is unfounded and unfair. The Government of Kenya stated in its Admissibility Application of 31 March 2011 that it sought to fulfill "its obligation under the Statute to file its admissibility challenge at the 'earliest opportunity' in compliance with Article 19(5) whilst recognising that further steps are being taken."[5] The Government of Kenya proposed from the very outset that its application be accepted as a staged one in which it would require 6 months to complete its investigation. The Government of Kenya stated that "[t]he Prosecutor and parties should of course be permitted a sufficient opportunity to respond to the Application and subsequent reports submitted by the Govermnent."[6]

17. The Government of Kenya did not take the Court and the parties by "surprise" nor did it dictate a timetable to the Pre-Trial Chamber. It requested pursuant to the broad terms of Rule 58 that it be permitted to provide updated information to the Pre-Trial Chamber as its national investigation progressed to demonstrate that an investigation was underway that did meet the requirements of Article 17.[7] The Government of

[4] Victims Observations of 19 July 2011, para. 22.
[5] Admissibility Application, para. 5, 13.
[6] Admissibility Application, para. 14.
[7] Admissibility Application, paras. 14-17, 79.

Kenya cited the relevant jurisprudence which supported its proposal.[8] In particular the Government referred to the holding of the Appeals Chamber which specifically states that "Article 17(1)(a) of the Statute covers a scenario where, at the time of the Court's *determination* of the admissibility of the case, investigation or prosecution is taking place in a State having jurisdiction. This is expressed by the use of the present tense, '[t]he case *is being* investigated or prosecuted by a State' (emphasis added)."[9] The OPCV ignores this finding in its observations.[10] The Prosecution has conceded that information filed after the initial application can be considered by the Pre-Trial Chamber.[11]

18. It was an entirely reasonable request from a respectful and compliant State Party of the ICC. The Pre-Trial Chamber never gave any reasons for rejecting this request. It insisted on proceeding without "undue delay", but never explained how, if at all, the Government of Kenya's approach would cause any unnecessary delay. The Pre-Trial Chamber never identified any prejudice that would be caused in the proceedings if the Government of Kenya were given the opportunity to make good its submission that it would complete all necessary judicial reforms and investigative processes within a six month period. It is not an unreasonable amount of time, yet the Pre-Trial Chamber (as supported by the OPCV) used it to question the good faith of the Government of Kenya.

19. The OPCV also questions the validity of information provided by the Commissioner of Police, referring to it as "counsel's undocumented submissions about his alleged conversation with Mr. Iteere."[12] The OPCV states that "Counsel is not normally permitted to attest to *sub judice* factual matters"[13] and that "[t]he Commissioner of Police cannot be said to be bound to the accuracy of the submissions of the Government's counsel which, in turn, undermines the verifiability and reliability of

[8] Admissibility Application, paras. 18, 19, 31, 32; Government Reply of 13 May 2011, paras. 24-26, 76, 77.
[9] *Prosecutor v. Katanga & Ngudjolo*, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ICC-01/04-01/07-1497, 25 September 2009, para. 75. (emphasis added)
[10] Victims Observations of 19 July 2011, para. 22-24.
[11] "Application on behalf of the Government of Kenya for Leave to Reply to the 'Prosecution's response to the '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.'"19 July 2011, para. 14-16. See Prosecution's Response to the Government of Kenya's Request to Reply, 21 April 2011, para. 3.
[12] Victims Observations of 19 July 2011, para. 32.
[13] Victims Observations of 19 July 2011, para. 32.

the information."[14] The OPCV maintains that the Commissioner of Police should have submitted a written statement in some form.[15]

20. Again, the OPCV avoids the real issue with these arguments. None of them demonstrate that there is "inactivity". At most they raise issues about the nature of the evidence submitted by the Government of Kenya, but they do not show that the Government of Kenya is inactive. More information could always be provided. The central question in the present appeal is whether an investigation is going on at all (not the genuineness of any investigation). There is clearly sufficient information to conclude that an investigation into the six Suspects is underway.

21. In any event, it is perfectly acceptable for Counsel to reflect the instructions they receive from their client in a filing. The Commissioner of Police was available to testify before the Chamber if it had any doubts about the validity of his instructions. Oral testimony is no less reliable than written evidence. Indeed, it is the most effective way of examining and testing credibility and reliability. For this reason (and others), the Government of Kenya will be applying to the Appeals Chamber for an oral hearing. It is only through the examination in person of those directing the national investigation that a fair and appropriate determination can be made.

22. The Government of Kenya submits that the Pre-Trial Chamber was plainly in error when it decided that there was "inactivity". Nothing in the observations of the OPCV show that the Pre-Trial Chamber's Decision should be upheld on appeal.

D. Updated investigation report

23. The OPCV submits that accepting or considering the substance of the Government of Kenya's latest investigation Report filed on 4 July 2011 would be "procedurally unsound" and would have a "negative impact on procedural fairness."[16] There is no merit in this argument. The parties have been given ample opportunity to respond to the latest Report. The Government of Kenya has in any event proposed in the alternative that the Appeal Chamber could send the matter back to the Pre-Trial

[14] Victims Observations of 19 July 2011, para. 32.
[15] Victims Observations of 19 July 2011, para. 32.
[16] Victims Observations of 19 July 2011, para. 46.

Chamber, or a newly constituted Pre-Trial Chamber, to consider the admissibility challenge.[17]

24. As with the Prosecution, the OPCV avoids the real issue of substance by claiming procedural impropriety. In only the second to last paragraph of its observations does the OPCV finally addresses the detail of the Report by claiming that the "information is indicative of investigations in general being carried out, or possibly in respect of other defendants, but no specific information is provided concerning the investigations of these defendants for the crimes alleged in the summons".[18] The OPCV completely ignores the concrete information that is provided in the Report about the investigative steps that are being taken in respect of the six Suspects. The skeletal and generalised observations of the OPCV do not bear intellectual scrutiny. The Report does not deal with any other defendants. In particular, it explains that the six Suspects are being interviewed about the alleged crimes that occurred during the Post-Election Violence.

25. There appears to be no logical reason why the OPCV would so strongly oppose consideration of a Report which the OPCV believes lacks any meaningful information. Moreover, the OPCV questions the Government of Kenya's submissions that the six Suspects are being investigated, but refuses to acknowledge the substance of the Report which establishes the progress made in the investigation of the six Suspects for crimes allegedly committed during the Post-Election Violence. The OPCV instead chooses to discredit the Government of Kenya's investigation by claiming that no concrete evidence has been submitted, but at the same time refuses to consider the concrete evidence that the Government of Kenya has provided in its updated Report.

26. The OPCV's suggestion that the Government of Kenya should in effect file another admissibility challenge based on this evidence is misconceived. The Government of Kenya had stated from the outset that updated reports would be filed. There is nothing in the Statute or Rules, or as a matter of good practice, which requires a State challenging admissibility to be barred from submitting up-to-date information about

[17] "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, para. 44; "Document in Support of the "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", 20 June 2011, para. 94.
[18] Victims Observations of 19 July 2011, para. 50.

its investigation. The Pre-Trial Chamber accepted such information.[19] Contrary to the OPCV's observations[20], the Appeals Chamber has held that the determination of admissibility must be based on the available facts at the time of the determination (and not the time of the first filing in the proceedings challenging admissibility).[21] The OPCV's argument undermines the very purpose of the admissibility determination - to decide on the basis of all relevant evidence whether the case before the ICC is being investigated by the national authorities.

27. In the respectful submission of the Government of Kenya, the Report filed on 4 July 2011 should be taken into account by the Appeals Chamber as it builds on previous reports (which the Government of Kenya had forecast in its original Admissibility Application), and demonstrates that the Pre-Trial Chamber's main finding that there is "inactivity" is a fundamental error.

E. Legal errors: "same person, same conduct" test

28. The OPCV makes only one observation on this topic, that "[t]he inability to obtain inaccessible information would not undermine the genuineness of a State Party's investigations"[22]. The OPCV asserts that if the Prosecution withheld information from the State the remedy is "not to curtail the same-conduct, same-person test, but rather to make a proper assessment of genuineness."[23]

[19] Admissibility Decision, paras. 63-65, 70.
[20] Victims Observations of 19 July 2011, paras. 22, 23.
[21] *Prosecutor v. Katanga & Ngudjolo*, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ICC-01/04-01/07-1497, 25 September 2009, para. 56, 75. The Appeals Chamber states in paragraph 56 that: "Generally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17(1)(a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time. Thus, a case that was originally admissibility may be rendered inadmissible by a change of circumstances in the concerned States and *vice versa.* ...the Statute assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, by ambulatory. Furthermore, the *chapeau* of article 17(1) of the Statute indicates that the admissibility of a case must be determined on the basis of the facts at the time of the proceedings on the admissibility challenge. The *chapeau* requires the Court to determine whether or not the case *is* inadmissible, and not whether it *was* inadmissible." The Appeal Chamber further states in paragraph 75 that: "Article 17(1)(a) of the Statute covers a scenario where, at the time of the Court's determination of the Admissibility of the case, investigation or prosecution is taking place in a State having jurisdiction. This is expressed by the use of the present tense, '[t]he case *is being* investigated or prosecuted by a State' (emphasis added)."
[22] Victims Observations of 19 July 2011, para. 43.
[23] Victims Observations of 19 July 2011, para. 43.

29. However, as the OPCV concedes the Pre-Trial Chamber's Decision was not based on the "genuineness" of the national investigation.[24] The Chamber held that there was no activity at all. The danger is that the Pre-Trial Chamber errorenously found that there was "inactivity" on account of the Government of Kenya not identifying specific evidence against the six Suspects when this evidence may have been in the sole possession of the ICC Prosecutor and inaccessible to the Kenyan authorities because it is controlled by the ICC Prosecutor. The Chamber failed even to acknowledge this possibility. The Government of Kenya has highlighted in its latest report of 1 July 2011 that it has not been able to locate certain witnesses who may have been moved by the Prosecutor.[25] It has also been reported that the Prosecution has granted lifetime protection to witnesses and removed these witnesses to European countries.[26]

30. The Government of Kenya has repeatedly stressed that irrespective of the test to be applied, it is investigating the six Suspects for crimes allegedly committed during the Post-Election Violence. Yet, the OPCV persists in suggesting that the Government's submissions about the legal definition of "case" cast doubt on whether it is truly investigating the six Suspects.[27]

F. Procedural errors

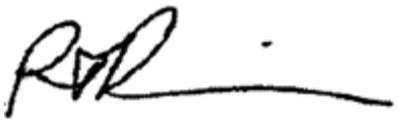
31. The OPCV argues that the Pre-Trial Chamber committed no procedural errors. It states in relation to an oral hearing that the Government "should have known from the outset, pursuant to Rule 58(2) of the Rules of Procedure and Evidence, that it could not rely on being granted an oral hearing".[28] As explained above, an oral hearing would have been the most effective procedure for assessing the nature of the national investigation through the presentation and examination of live evidence, especially when the Pre-Trial Chamber was disposed to find that no investigation in any form was underway. The Chamber gave no proper reasons for refusing an oral hearing that would have provided the opportunity to test the Government of Kenya's submissions and evidence.

[24] Victims Observations of 19 July 2011, para. 42.
[25] "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility", Annex 1, 4 July 2011, p. 3.
[26] "ICC gives 14 Witnesses Lifetime Protection", allAfrica, 11 July 2011, http://allafrica.com/stories/201107120011.html.
[27] Victims Observations of 19 July 2011, para. 10 quoting Admissibility Application, paras. 69, 71.
[28] Victims Observations of 19 July 2011, para. 36.

32. In respect of the Request for Assistance, the Government of Kenya has never claimed that it needed the ICC Prosecutor's evidence to conduct its own investigation.[29] The point highlighted by the Government is that there was no sound basis for the Prosecutor to refuse to cooperate with the Government, and that such refusal served to weaken the Government's admissibility challenge before the Pre-Trial Chamber. Had the Chamber decided that the ICC's evidence should be disclosed to the Kenyan authorities it would have been a clear indication that the Government of Kenya could be trusted to use this evidence in its national proceedings to assume jurisdiction over the two cases presently before the ICC. The Pre-Trial Chamber's failure to do so may reflect a pre-disposition in this case or a pre-judgment of issues that requires appellate review.

G. Conclusion

33. The Government of Kenya respectfully submits that the observations of the OPCV add little, if nothing, to the submissions already before the Appeals Chamber. They merely repeat the same unfounded argument advanced by the Prosecution that there is no investigation underway in Kenya. The Government of Kenya underscores its submission to the ICC that it is presently investigating the six Suspects and that the cases currently before the ICC should thus be declared inadmissible.



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Dated 26th July 2011
London, United Kingdom

[29] Victims Observations of 19 July 2011, para. 42.