

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-01/09-02/11  
Date: **20 September 2011**

**PRE-TRIAL CHAMBER II**

**Before: Judge Ekaterina Trendafilova, Single Judge**

**SITUATION IN THE REPUBLIC OF KENYA  
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA,  
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

**Public**

**Decision on the "Request by the Government of Kenya in respect of the  
Confirmation of Charges Proceedings"**

Decision 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 the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

Geoffrey Nice  
Rodney Dixon

**Amicus Curiae**

**REGISTRY**

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**Registrar & Deputy Registrar**

Silvana Arbia, Registrar  
Didier Preira, Deputy Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Judge Ekaterina Trendafilova**, acting as Single Judge on behalf of Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court"),<sup>1</sup> renders this decision with respect to the request of the Government of Kenya to be present in the courtroom during the confirmation of charges hearing in the present case.

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before the Court.<sup>2</sup> Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011, during which, *inter alia*, the Chamber scheduled the commencement of the confirmation of charges hearing (the "Hearing") for Wednesday, 21 September 2011.<sup>3</sup>

2. On 30 May 2011, the Chamber rendered 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" in which it determined that the case is admissible (the "30 May 2011 Decision").<sup>4</sup>

3. On 30 August 2011, the Appeals Chamber dismissed the appeal against the 30 May 2011 Decision lodged by the Government of Kenya and confirmed the finding of the Chamber that the case is admissible.<sup>5</sup>

4. On 16 September 2011, the Government of Kenya submitted the "Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings" (the Request)<sup>6</sup> in which it requests "that it be permitted to have legal representation in the courtroom" during the Hearing.<sup>7</sup> The Government of Kenya purports to have

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<sup>1</sup> Pre-Trial Chamber II, "Decision Designating a Single Judge", ICC-01/09-02/11-9.

<sup>2</sup> Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-01.

<sup>3</sup> ICC-01/09-02/11-T-1-ENG, from page 13, line 25 to page 14, line 18.

<sup>4</sup> Pre-Trial Chamber II, ICC-01/09-02/11-96.

<sup>5</sup> Appeals Chamber, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", ICC-01/09-02/11-274.

<sup>6</sup> ICC-01/09-02/11-334.

<sup>7</sup> *Ibid.*, para. 22.

procedural standing and must therefore be present in the courtroom on the basis of the following reasons: (1) the request for leave to appeal the Chamber's "Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence"<sup>8</sup> filed by the Government of Kenya on 4 July 2011<sup>9</sup> is still pending before the Chamber;<sup>10</sup> (2) a further "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10), Article 96 and Rule 194"<sup>11</sup> has been submitted to the Chamber;<sup>12</sup> (3) the intention of two suspects "to raise issues concerning the admissibility of the case before the Court" which "directly concerns the Government of Kenya" and which could "answer any questions and assist the [Chamber] in any matters pertaining to admissibility or related matters" if it was permitted to be present in the courtroom;<sup>13</sup> (4) the fact that "certain allegations may involve information impinging on the national security interests of the State of Kenya" within the meaning of article 72 of the Rome Statute which may arise during the Hearing;<sup>14</sup> and (5) the fact that the Government of Kenya is actively investigating the suspects of the present case which makes it necessary to "hear the evidence presented and the submissions of all of the parties whether given in public or confidentially"<sup>15</sup>.

5. The Single Judge notes articles 61 and 72 of the Rome Statute (the "Statute") and rules 58 and 122(1) of the Rules of Procedure and Evidence (the "Rules").

6. At the outset, the Single Judge notes that according to rule 122(1), second sentence, of the Rules, "[t]he Presiding Judge shall determine how the hearing is to be conducted (...)". She also recalls the fact that the Government of Kenya made a similar request in relation to the confirmation of charges hearing in the case of the

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<sup>8</sup> Pre-Trial Chamber II, ICC-01/09-63.

<sup>9</sup> ICC-01/09-71.

<sup>10</sup> ICC-01/09-02/11-334, paras 4-5.

<sup>11</sup> ICC-01/09-79.

<sup>12</sup> ICC-01/09-02/11-334, para. 6.

<sup>13</sup> ICC-01/09-02/11-334, paras 10-14.

<sup>14</sup> ICC-01/09-02/11-334, paras 15-18.

<sup>15</sup> ICC-01/09-02/11-334, paras 19-21.

*Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* which was rejected.<sup>16</sup> The Single Judge does not consider it necessary to deviate from her principled approach in the present case for the following reasons.

7. As summarized above in paragraph 4 under items (1) and (2), the Government of Kenya bases its Request, *inter alia*, on the fact that some questions pertaining to a possible assistance under article 93(10) of the Statute are still pending before the Chamber. However, the Single Judge recalls that the set of questions relating to article 93(10) of the Statute arises in the context of the *situation* and not the present case. More importantly, the purpose of the confirmation of charges hearing is to consider, in principle, the charges presented by the Prosecutor against the suspects and not matters that pertain to cooperation between States and the Court. Thus, Kenya's applications with respect to article 93(10) of the Statute cannot be taken into consideration when addressing the merits of the present Request.

8. As summarized above in paragraph 4 under item (3), the Government of Kenya bases its Request, *inter alia*, on the fact that two suspects indicated to raise issues of admissibility during the Hearing. However, only one suspect finally lodged a challenge to the admissibility of the case.<sup>17</sup> The Single Judge recalls the "Decision on the Schedule for the Confirmation of Charges Hearing"<sup>18</sup> in which it was held that in case any challenge to the jurisdiction of the Court or the admissibility of the case is brought by any of the suspects, "it is not necessary that [the challenges] are addressed orally at the courtroom sessions of the Hearing".<sup>19</sup> In other words, the Chamber will not hear any submissions on the issue of jurisdiction or admissibility of the case during the Hearing.

9. The Single Judge also notes that a State becomes a participant to the proceedings on admissibility only in particular instances where the interests of a State are

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<sup>16</sup> Pre-Trial Chamber II, "Decision on the 'Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings'", ICC-01/09-01/11-313.

<sup>17</sup> ICC-01/09-02/11-338.

<sup>18</sup> Pre-Trial Chamber II, ICC-01/09-02/11-321.

<sup>19</sup> *Ibid.*, para. 17.

envisaged by the Court's statutory documents.<sup>20</sup> This is the case, for example, where the State has challenged the admissibility of the case under article 19(2)(b) of the Statute. However, this is not the case in the context of the present proceedings as the admissibility challenge was lodged by a suspect – although this does not mean that a State will never have an interest when it is not the triggering entity of such a challenge. The language of article 19(3) of the Statute and rule 59(1)(a) of the Rules makes clear that a State shall be informed about an admissibility challenge and provided with a summary of its grounds only if the situation was received by way of a State Party referral as opposed to a *proprio motu* request submitted by the Prosecutor as is the present case. This approach suggests that the drafters intended to exclude States Parties from proceedings in a scenario such as the one *sub judice*. Thus, the Republic of Kenya cannot be considered as a participant in the instant proceedings and the argument as presented by the Government of Kenya must fail.

10. As summarized above in paragraph 4 under item (4), the Government of Kenya bases its Request, *inter alia*, on the fact that sensitive information regarding Kenya's security interests within the meaning of article 72 of the Statute may arise in the Hearing. The Government of Kenya purports, in particular, that the Prosecutor alleges that the "State House" was involved in the commission of alleged crimes.<sup>21</sup> Therefore, the Government of Kenya advances, it "must be present in the courtroom to hear the [Prosecutor's] submissions and evidence" whether in public or private session so that the "Government can be in a position to determine whether the disclosure of any materials would prejudice its national security interests and to take appropriate steps as provided for in the Statute".<sup>22</sup>

11. At first, the Single Judge notes that article 72 of the Statute serves as a basis for a State to prevent the disclosure of information or documents if in the opinion of that

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<sup>20</sup> See also Pre-Trial Chamber II, "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute", ICC-01/09-02/11-40, para. 11.

<sup>21</sup> ICC-01/09-02/11-334, para. 15.

<sup>22</sup> ICC-01/09-02/11-334, paras 15 and 18.

State the disclosure of such material would prejudice its national security interests. In the present case, however, the Single Judge observes that the evidence concerned has already been disclosed between the parties without the Government of Kenya raising any concerns during the phase of disclosure preceding the Hearing. Even if the Single Judge was to interpret article 72(4) of the Statute broadly and accept that the Government of Kenya learned at this late stage that information or documents, which are being or are likely to be disclosed, would prejudice its national security interests, the Chamber cannot but assess this claim in the wider context against the facts as presented in the Government's Request. The assertion put forth by the Government of Kenya, namely the purported implication of the "State House", seems to be based on a *particular* reading of the document containing the charges and is not convincing in itself to justify an automatic reference to national security interests. Further, the simple mention of the word "State House" in the document containing the charges cannot compensate the lack of any proper substantiation of the existence of "information or documents *of a State*" which would satisfy the legal requirements of article 72 of the Statute. Therefore, the argument as presented by the Government of Kenya must fail.

12. As summarized above in paragraph 4 under item (5), the Government of Kenya bases its Request, *inter alia*, on the fact that it is actively investigating the suspects of the present case. It therefore alleges to have a "legitimate interest" in being present in the courtroom and to hear the evidence presented and submissions made by all parties whether given publicly or confidentially.<sup>23</sup> The Single Judge takes note of the purported investigative activities of the Government of Kenya in relation to the three suspects in this case. However, national investigative activities are conducted independently from this Court and based on the national laws of the Republic of Kenya. Accordingly, the simple assertion of the existence of national investigations cannot justify *per se* the presence of the Government of Kenya in the courtroom, contrary to the statutory documents providing for explicit instances of State

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<sup>23</sup> ICC-01/09-02/11-334, para. 20.

participation in the proceedings before the Court, Hence, the argument as presented by the Government of Kenya must equally fail.

**FOR THESE REASONS, THE SINGLE JUDGE**

**rejects** the Request filed by the Government of Kenya.

Done in both English and French, the English version being authoritative.

  

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Judge Ekaterina Trendafilova  
Single Judge

Dated this Tuesday, 20 September 2011

At The Hague, The Netherlands