

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 2 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 THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA,  
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

**Public  
URGENT**

**Decision under Regulation 24(5) of the Regulations of the Court on the Motion  
Submitted on Behalf of the Government of Kenya**

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 Francis Kirimi Muthaura**

Karim A. Khan and Kennedy Ogetto

**Counsel for Uhuru Muigai Kenyatta**

Steven Kay and Gillian Higgins

**Counsel for Mohammed Hussein Ali**

Evans Monari, John Philpot, and  
Gershom Otachi Bw'omanwa

**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

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**PRE-TRIAL CHAMBER II** (the “Chamber”) of the International Criminal Court (the “Court”) is seized of the “Motion on Behalf of the Government of Kenya 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” in which the Government of Kenya seeks leave to reply to observations regarding the Government’s admissibility challenge (the “Motion”) pursuant to article 19(2)(b) of the Rome Statute (the “Statute”).<sup>1</sup>

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 on 7 April 2011.<sup>2</sup>

2. On 18 March 2011, the Chamber decided that the initial appearance hearing shall be convened on Friday, 8 April 2011 at 14.30 hours.<sup>3</sup>

3. On 31 March 2011, the Chamber received the “Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute”, requesting the Chamber to determine that the case, against the three persons for whom summonses to appear have been issued, is inadmissible (the “Kenyan Request”).<sup>4</sup>

4. On 4 April 2011, the Chamber issued the “Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute”, in which it, *inter alia*, requested that the Prosecutor and the Defence submit written observations on the Kenyan Request no later than Thursday, 28 April 2011 (the “4 April 2011 Decision”).<sup>5</sup> The Chamber invited also the victims who have communicated with the Court namely, those who submitted

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<sup>1</sup> ICC-01/09-02/11-53.

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

<sup>3</sup> Pre-Trial Chamber II, “Decision Setting a New Date for the Initial Appearance”, ICC-01/09-02/11-8.

<sup>4</sup> ICC-01/09-02/11-26.

<sup>5</sup> ICC-01/09-02/11-40, p. 7.

applications to participate in the Court's proceedings with regard to the present case,<sup>6</sup> to make written observations and submit them on the same date.<sup>7</sup> Should they desire to submit written observations, the Chamber decided that the Office of Public Counsel for Victims (the "OPCV") shall do so on their behalf.<sup>8</sup>

5. On 11 April 2011, the Chamber received the Motion, in which the Government of Kenya requested to "be given 30 days to reply from the deadline when responses must be received, namely by 30 May 2011".<sup>9</sup>

6. On 18 April 2011, the OPCV filed the "Response to Government of Kenya's Motion for Leave to Reply", in which it requested the Chamber to reject the Motion on the grounds that it is "premature" and "exceed[s] the proper scope of reply" (the "OPCV Request").<sup>10</sup>

7. On 26 April 2011, the Prosecutor submitted the "Prosecution's response to the Government of Kenya's request to reply", in which he argued in favour of granting the Motion as far as it does not exceed "the 10 day time limit proscribed in Regulation 34(c)" of the Regulations of the Court (the "Regulations").<sup>11</sup>

8. On 28 April 2011, the Chamber received the observations to the Kenyan Request submitted by the Defence for Mohammed Hussein Ali,<sup>12</sup> the Prosecutor,<sup>13</sup> the Defence for Francis Kirimi Muthaura and Uhuru Muigai Kenyatta,<sup>14</sup> as well as the observations on behalf of the victims submitted by the OPCV.<sup>15</sup>

9. On 2 May 2011, the Government of Kenya submitted its "Application on behalf of the Government of Kenya for leave to reply to responses, filed on 28 April 2011, to

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<sup>6</sup> *Ibid.*, para. 12.

<sup>7</sup> *Ibid.*, p. 7.

<sup>8</sup> *Ibid.*

<sup>9</sup> ICC-01/09-02/11-53, pp. 5-6.

<sup>10</sup> ICC-01/09-02/11-61, pp. 3, 7.

<sup>11</sup> ICC-01/09-02/11-68, para. 6.

<sup>12</sup> ICC-01/09-02/11-70.

<sup>13</sup> ICC-01/09-02/11-71.

<sup>14</sup> ICC-01/09-02/11-72.

<sup>15</sup> ICC-01/09-02/11-74.

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", wherein it reiterated its request already outlined in its previous Motion.<sup>16</sup>

10. The Chamber notes articles 19(2)(b), 21(1)(a) and (3) of the Statute, rule 58(2) and (3) of the Rules of Procedure and Evidence (the "Rules"), and regulations 24(5), 31 and 34(c) of the Regulations.

11. The Chamber notes that in its Motion, the Government of Kenya argued that the 4 April 2011 Decision "was silent on [...] its right [...] as the Applicant to reply to [the observations to be submitted by the parties and participants once filed [on 28 April 2011], [and that the] Pre-Trial Chamber did not mention the right of reply at the initial appearance hearing [...] when discussing the timetable for the determination of [...] [its] Application [...] pursuant to Article 19".<sup>17</sup>

12. At the outset, the Chamber wishes to clarify that parties and participants to the proceedings should be aware of their rights and duties as outlined under the Court's statutory document. The role of the Pre-Trial Chamber is not to serve as an advisory body to those involved in the proceedings. Rather, in performing its judicial functions the Chamber's main role is to ensure that proceedings are conducted in a fair and expeditious manner. Only if the Chamber has identified one or more instances which require its intervention as dictated by law, it shall direct the parties or participants as part of the exercise of its judicial functions.

13. Thus, in the context of the present case, the Chamber was not obliged to inform the State's representatives of their right to reply to the observations to be submitted by the other parties to the proceedings in its 4 April 2011 Decision. Nor was the Chamber obliged to do so at the initial appearance hearing, in which it only addressed the points that it deemed strictly necessary to serve the hearing's limited

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<sup>16</sup> ICC-01/09-02/11-76, para. 19.

<sup>17</sup> ICC-01/09-02/11-53, para. 2.

purpose. The issue of admissibility was mentioned briefly by the Presiding Judge in the context of responding to the Prosecutor's enquiry regarding the impact of the Government's challenge on the process of disclosure.<sup>18</sup> This is an entirely different context than organizing the admissibility proceedings which was already done in the Chamber's 4 April 2011 Decision.<sup>19</sup> Thus, the Chamber reiterates that this was neither the purpose of this hearing nor the right time to discuss any further organization of the admissibility proceedings.

14. Turning to the Government's request as presented in the Motion, the Chamber observes that it relies on the language used in rule 58(2) of the Rules concerning the organization of the proceedings related to an admissibility challenge. Although it is true that the Chamber "is bestowed with the necessary discretion to organize the proceedings" related to the Government's challenge "in a manner that best suits the circumstances of each particular case", it cannot act beyond the parameters dictated by law as envisaged by rule 58 in its entirety. In this regard, the Chamber recalls the last sentence of rule 58(3) of the Rules, which makes clear that the Defence and the Prosecutor "shall [be] allow[ed] to submit written observations to the [...] application [challenging the admissibility of the case pursuant to article 19(2) of the Statute] within a period of time determined by the Chamber". This suggests that rule 58 of the Rules only obliges the Chamber to permit the submission of written observations in the form of a response to a certain document, but does not require it to permit replies to the said response.

15. The response to any written submission is addressed and located elsewhere in the Court's statutory provisions that is, under regulations 24 and 34 of the Regulations. According to regulation 24(5) of the Regulations, "[p]articipants may only reply to a response with the leave of the Chamber [...]" and that if such leave had been granted, regulation 34(c) of the Regulations states that "a reply shall be filed within

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<sup>18</sup> ICC-01/09-02/11-T-1-ENG ET WT, 8 April 2011, pp. 19-21 in particular, p.20, lines 11-15, 21-24.

<sup>19</sup> ICC-01/09-02/11-40.

ten days of notification [...] of the response”, unless otherwise ordered by the Chamber.

16. The Chamber is aware of the delicacy of the admissibility challenge, the main subject-matter under consideration, which goes to the heart of the States’ sovereign rights. Nonetheless, the Chamber is also duty-bound to draw a balance between the competing interests at stake. It must ensure that proceedings are fair in the sense that, *inter alia*, the Government lodging the challenge enjoys the opportunity to respond to the parties’ and participants’ observations, but equally expeditious in order to avoid unnecessary delays of the entire proceedings. Bearing in mind these considerations, the Chamber deems it sufficient to grant the Government of Kenya the ten days time limit provided in regulation 24(5) of the Regulations, to respond to the written observations submitted by the Prosecutor, the Defence and the OPCV on 28 April 2011, and to engage *solely* with the relevant issues as raised in the observations received.<sup>20</sup>

**FOR THESE REASONS, THE CHAMBER HEREBY**

**a) rejects** the request of the Government of Kenya to be granted 30 days to reply to the observations submitted on 28 April 2011;

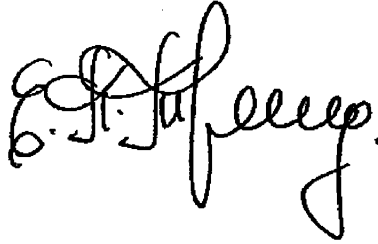
**b) rejects** the OPCV’s Request;

**c) decides** to grant the Government of Kenya the opportunity to reply to the written observations submitted on 28 April 2011 by the Prosecutor, the Defence and the OPCV, as specified in paragraph 16 of the present decision, by no later than **Friday, 13 May 2011, at 16.00 hours.**

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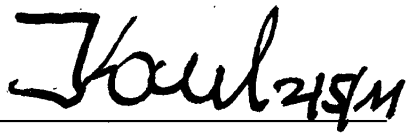
<sup>20</sup> While concurring with the Chamber, Judge Hans-Peter Kaul reiterates his declaration annexed to the 4 April 2011 Decision, ICC-01/09-02/11-40.

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



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**Judge Ekaterina Trendafilova**  
**Presiding Judge**



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**Judge Hans-Peter Kaul**  
**Judge**



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**Judge Cuno Tarfusser**  
**Judge**

Dated this Monday, 2 May 2011

At The Hague, The Netherlands