Cour Pénale Internationale

International Criminal Court

Original: English

No. ICC-01/09-02/11 OA
Date: 14 July 2011

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public document

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"

Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for Francis Kirimi Muthaura
Mr Karim A. A. Khan
Mr Kennedy Ogeto

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins

Counsel for Mohammed Hussein Ali
Mr Gregory Kehoe
Mr Evans Monari

States Representatives
Mr Geoffrey Nice
Mr Rodney Dixon

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II 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" of 30 May 2011 (ICC-01/09-02/11-96),

Having before it the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility" of 4 July 2011 (ICC-01/09-02/11-153) and 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'" of 12 July 2011 (ICC-01/09-02/11-168),

Pursuant to regulation 28 of the Regulations of the Court,

Unanimously

Issues the following

ORDER

Mr Muthaura, Mr Kenyatta and Mr Ali shall file, by 10h00 on Tuesday 19 July 2011, any observations as to whether the Appeals Chamber should accept or should dismiss *in limine* the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility".

REASONS

1. On 20 June 2011, the Republic 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'"[1] (hereinafter: "Document in Support of the Appeal"), in

[1] ICC-01/09-02/11-130. A Corrigendum thereto was filed on 21 June 2011, ICC-01/09-02/11-130-Corr.

which it indicated that it would "file updated reports on the investigation during the appellate proceedings".[2]

2. On 4 July 2011, the Republic of Kenya submitted the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility"[3] (hereinafter: "Updated Investigation Report"). Kenya requests the Appeals Chamber "to accept this Report as further confirmation that the national investigation into the six ICC suspects is ongoing and progressing expeditiously".[4] Kenya justifies its submission of the Updated Investigation Report on the basis that, in its view, "[t]he Appeals Chamber has acknowledged that national investigations and prosecutions may develop and change over time, and that therefore the determination of admissibility is an ongoing process which must be decided on the facts as they exist at the time of the admissibility proceedings".[5]

3. On 12 July 2011, the Prosecutor filed 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'"[6] (hereinafter: "Response to the Document in Support of the Appeal"). The Prosecutor responds to the Updated Investigation Report stating that "the Appeals Chamber should dismiss this report *in limine*".[7] The Prosecutor advances four reasons for dismissing *in limine* the Updated Investigation Report. First, Kenya is presenting additional evidence without first filing an application to do so as required by regulation 62 of the Regulations of the Court.[8] Second, as the Updated Investigation Report concerns events subsequent to the filing by Kenya of its challenge to the admissibility of the case, it is irrelevant to the question of whether the Pre-Trial Chamber committed an error in finding the case admissible.[9] Third, the

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[2] Document in Support of the Appeal, para. 52.
[3] ICC-01/09-02/11-153.
[4] Updated Investigation Report, para. 3.
[5] Updated Investigation Report, para. 3.
[6] ICC-01/09-02/11-168.
[7] Response to the Document in Support of the Appeal, para. 35.
[8] Response to the Document in Support of the Appeal, para. 35.
[9] Response to the Document in Support of the Appeal, para. 35.

Report provides no proof of concrete investigative steps against the suspects in this case.[10] Fourth, the report is unclear, inconsistent and lacks probative value.[11]

The Appeals Chamber notes that Kenya has, in its Document in Support of the Appeal and the Updated Investigation Report, set out its views in detail as to the legal basis for submitting the Updated Investigation Report.[12] The Prosecutor has also set out his detailed views in response in the Response to the Document in Support of the Appeal.[13] Accordingly, it is not necessary to hear further from either Kenya or the Prosecutor on this matter. However, the Appeals Chamber considers it desirable to provide an opportunity for the other parties to provide their views. The Appeals Chamber therefore requests Mr Muthaura, Mr Kenyatta and Mr Ali to file any observations they may have as to whether the Updated Investigation Report should be accepted or should be dismissed *in limine*.

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

Judge Daniel David Ntanda Nsereko
Presiding Judge

Dated this 14th day of July 2011

At The Hague, The Netherlands

[10] Response to the Document in Support of the Appeal, para. 35.
[11] Response to the Document in Support of the Appeal, para. 35.
[12] *See* Document in Support of the Appeal, para. 52 and fn. 42 thereto; Updated Investigation Report, para. 3.
[13] Response to the Document in Support of the Appeal, para. 35.