

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/09 OA  
Date: 10 August 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**

**Public document**

**Decision on the admissibility of the “Appeal of the Government of Kenya against the ‘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’”**

**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

**States Representatives**

Mr Geoffrey Nice

Mr Rodney Dixon

**REGISTRY**

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**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 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” of 29 June 2011 (ICC-01/09-63),

Having before it the “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 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”” of 25 July 2011 (ICC-01/09-76; hereinafter: “Application for Leave to Reply”),

After deliberation,

*Renders* unanimously the following

## DECISION

1. The Application for Leave to Reply is rejected.
2. The appeal is dismissed.

## REASONS

### I. PROCEDURAL HISTORY

1. On 21 April 2011, the Republic of Kenya (hereinafter: “Kenya”) filed the “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194”<sup>1</sup> (hereinafter “Request for Assistance”). Kenya requested “the assistance of and cooperation from the Court and the Prosecutor in respect of its national investigations into allegations of Post-Election Violence in Kenya”, specifically the “transmission of all statements, documents, or other types of evidence obtained by the Court and the Prosecutor in the course of the ICC

<sup>1</sup> ICC-01/09-58.

investigations into the Post-Election Violence in Kenya, including into the six suspects presently before the ICC”.<sup>2</sup> Kenya requested the Registrar to transmit the Request for Assistance both to the Court and to the Prosecutor.<sup>3</sup>

2. On 29 June 2011, Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) issued the “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>4</sup> (hereinafter: “Impugned Decision”). The Pre-Trial Chamber considered that it could grant a request for co-operation and assistance only in relation to material or evidence in its possession, and not to that in the possession of the Prosecutor.<sup>5</sup> With respect to material or evidence in its possession, the Pre-Trial Chamber found that Kenya had not sufficiently established that its Request for Assistance was linked to its “conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State” as required by article 93 (10) of the Statute.<sup>6</sup> The Pre-Trial Chamber therefore rejected the Request for Assistance.

3. On 4 July 2011, Kenya filed the “Appeal of the Government of Kenya against the ‘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>7</sup> (hereinafter: “Appeal”). Kenya seeks to bring this appeal as of right on the basis of article 82 (1) (a) of the Statute.

4. On 12 July 2011, the Appeals Chamber issued the “Directions of the Appeals Chamber”<sup>8</sup> (hereinafter: “Directions”) in which it permitted the Prosecutor to respond, by 16h00 on 21 July 2011, to the submissions in the Appeal concerning the legal basis for the filing of the appeal. The Appeals Chamber stated that “[s]ubject to the decision of the Appeals Chamber on the admissibility of the present appeal, directions will be given with regard to the submission of the document in support of the appeal and the

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<sup>2</sup> Request for Assistance, paras 1-2.

<sup>3</sup> Request for Assistance, para. 4.

<sup>4</sup> ICC-01/09-63.

<sup>5</sup> Impugned Decision, paras 30-32.

<sup>6</sup> Impugned Decision, paras 33-34.

<sup>7</sup> ICC-01/09-70.

<sup>8</sup> ICC-01/09-74.

time within which it may be filed, as well as the time within which the Prosecutor may lodge his response”.<sup>9</sup>

5. On 20 July 2011, as directed by the Appeals Chamber, the Prosecutor filed the “Prosecution’s Response to the ‘Appeal of the Government of Kenya against the “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” (ICC-01/09-70)”<sup>10</sup> (hereinafter: “Prosecutor’s Response”) in which he argued that the Appeal should be rejected *in limine* as it does not constitute an appeal “with respect to [...] admissibility” under article 82 (1) (a) of the Statute.

6. On 25 July 2011, Kenya filed the Application for Leave to Reply in which Kenya seeks leave to reply to the Prosecutor’s Response “[g]iven the importance of the issues”.<sup>11</sup>

## II. PRELIMINARY ISSUE: DECISION ON THE APPLICATION FOR LEAVE TO REPLY

7. Before addressing whether Kenya may appeal the Impugned Decision under article 82 (1) (a) of the Statute, the Appeals Chamber must address, as a preliminary issue, Kenya’s request for leave to reply to the Prosecutor’s Response.

8. Kenya filed its Application for Leave to Reply under regulation 24 (5) of the Regulations of the Court. That regulation provides that participants may only reply to a response filed pursuant to regulation 24 with leave of the relevant Chamber.<sup>12</sup> However, regulation 24 (5) of the Regulations of the Court does not apply to the

<sup>9</sup> Directions.

<sup>10</sup> ICC-01/09-75.

<sup>11</sup> Application for Leave to Reply, para. 4.

<sup>12</sup> The Appeals Chamber recalls, however, that, regulation 24 (5) does not permit the filing of replies to responses to documents in support of appeals as “the more specific provisions of subsection 1 of Section 4 of Chapter 3 of the Regulations of the Court do not foresee replies to responses to documents in support of appeals”. *Prosecutor v. Francis Kirimi Muthaura et al.*, “Decision on the 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””, 1 August 2011, ICC-01/09-02/11-206 (OA), para 8 (quoting *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Prosecutor’s ‘Application for Leave to Reply to “Conclusions de la défense en réponse au mémoire d’appel du Procureur””, 12 September 2006, ICC-01/04-01/06-424, para. 6); *Prosecutor v. Germain Katanga*, “Decision on the Prosecution’s Request for Leave to Reply”, 18 January 2008, ICC-01/04-01/07-148 (OA), para. 3

present application. This is so because on the basis of the Appeal, which contained substantive submissions on the admissibility of the appeal, the Appeals Chamber decided to examine that limited, preliminary question *in limine*. For that purpose, the Appeals Chamber, acting under regulation 28 of the Regulations of the Court, gave the Prosecutor the opportunity to express his views on this question. Therefore the Prosecutor's submission did not constitute a response under regulation 24 (1) of the Regulations of the Court but a submission sought under regulation 28 of the Regulations of the Court.

9. The Appeals Chamber may consider seeking further observations from Kenya pursuant to regulation 28 of the Regulations of the Court if "necessary for the proper disposal of the appeal".<sup>13</sup> The Appeals Chamber observes that the reasons which Kenya now puts forward for seeking leave to reply comprise a re-iteration of the arguments it put forward in the Appeal,<sup>14</sup> a substantive reply to the Prosecutor's Response<sup>15</sup> and arguments concerning the merits of the appeal.<sup>16</sup> The Appeals Chamber does not consider that Kenya's intended submissions would provide any new or additional information or arguments which would assist it in resolving the issue of the admissibility of the appeal.

10. For these reasons, the Appeals Chamber rejects the Application for Leave to Reply.

### III. MERITS

#### A. Arguments of the Parties

##### 1. Arguments of Kenya

11. Kenya argues that the Impugned Decision constitutes a "decision [...] with respect to admissibility which may be appealed as of right pursuant to article 82 (1) (a) of the Statute."<sup>17</sup> Kenya argues that its Request for Assistance must be seen in light of its "Application on Behalf of the Government of the Republic of Kenya Pursuant to

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<sup>13</sup> *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Prosecutor's 'Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'", 12 September 2006, ICC-01/04-01/06-424, para. 7.

<sup>14</sup> Application for Leave to Reply, paras 16-18.

<sup>15</sup> Application for Leave to Reply, paras 19-20.

<sup>16</sup> Application for Leave to Reply, paras

<sup>17</sup> Appeal, paras 4-5.

Article 19 of the ICC Statute”<sup>18</sup> (hereinafter: “Article 19 Application”) wherein it challenged the admissibility of the cases of *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* and *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*. Kenya argues that it filed the Request for Assistance to obtain access to evidence to assist it in its national investigation of the suspects in those cases and that the Pre-Trial Chamber’s denial of the Request for Assistance prevented Kenya from gaining information and evidence which could significantly assist that investigation.<sup>19</sup>

12. Kenya admits that the Article 19 Application “is, of course, not at all dependent on receiving the ICC’s evidence”.<sup>20</sup> Nevertheless, Kenya argues that the rejection of the Request for Assistance “may *seem* to weaken the [Article 19] Application” due to “Kenya’s inability to act on such evidence in its own investigation”.<sup>21</sup> Kenya argues that the “inter-relationship” between the Request for Assistance and the Article 19 Application is further demonstrated by its filings in the proceedings related to the Article 19 Application wherein it argued that “[a] State may simply not have evidence available to the Prosecutor of the ICC or may even be deprived of such evidence (as here where the Prosecutor has, to date, not provided evidence he possesses to the Government of Kenya and has now indicated that he will refuse to do so)” and that, therefore, “there is simply no guarantee that an identical cohort of individuals will fall for investigation by the State seeking to exclude ICC admissibility as by the ICC Prosecutor seeking to establish it”.<sup>22</sup> Finally, Kenya notes that it has also filed appeals against the Pre-Trial Chamber’s decisions on the Article 19 Application and argues that the Appeals Chamber should not decide those appeals “without determining whether Kenya is entitled to have access to the ICC’s evidence”.<sup>23</sup>

## 2. Arguments of the Prosecutor

13. The Prosecutor argues that the Appeal should be dismissed. He submits that “[t]he fact that the cooperation and assistance was sought in connection with an

<sup>18</sup> 31 March 2011, ICC-01/09-01/11-19 and ICC-01/09-02/11-26.

<sup>19</sup> Appeal, para. 6.

<sup>20</sup> Appeal, para. 7.

<sup>21</sup> Appeal, para. 7.

<sup>22</sup> Appeal, para. 9 (quoting “Reply on behalf of the Government of Kenya to the Responses of the Prosecutor, Defence, and OPCV to the Government’s Application pursuant to Article 19 of the Rome Statute”, 13 May 2011, ICC-01/09-01/11-89, para. 27).

<sup>23</sup> Appeal, para. 10.

alleged national investigation that underlies the separate admissibility challenge does not render the denial of the cooperation request ‘a decision with respect to jurisdiction or admissibility’.<sup>24</sup> The Prosecutor argues that “[t]he ruling that the [Government of Kenya] is now seeking to challenge [...] is *not* a decision on admissibility: it is a separate ruling pertaining to a request for cooperation”.<sup>25</sup> He argues that “[t]he fact that the [Government of Kenya] considers as part of its admissibility appeal that its subsequent request for assistance was linked to its admissibility challenge cannot modify the nature of the Decision and turn it into a ruling on admissibility”.<sup>26</sup>

14. The Prosecutor observes that, according to the Appeals Chamber’s jurisprudence, “a party may raise on appeal procedural errors allegedly vitiating a decision on admissibility” and notes that Kenya has raised the Pre-Trial Chamber’s refusal to decide on the Request for Assistance as a procedural error in its appeals against the decisions on the Article 19 Application.<sup>27</sup> The Prosecutor notes that Kenya has also sought leave of the Pre-Trial Chamber, pursuant to article 82 (1) (d) of the Statute, to appeal the Impugned Decision.<sup>28</sup> In these circumstances, the Prosecutor argues that Kenya “has had ample recourse to advance its position and cannot validly claim any prejudice arising out of a rejection of this appeal”.<sup>29</sup>

### **B. Determination by the Appeals Chamber**

15. Article 82 (1) (a) of the Statute provides that either party may appeal “a decision with respect to jurisdiction or admissibility”. The Appeals Chamber understands from the phrase “decision with respect to” that the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility. As previously held by the Appeals Chamber, a decision of a Pre-Trial or Trial Chamber may constitute a “decision with respect to [...] admissibility” only to the extent that it consisted of or

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<sup>24</sup> Prosecutor’s Response, para. 2.

<sup>25</sup> Prosecutor’s Response, para. 17.

<sup>26</sup> Prosecutor’s Response, para. 17.

<sup>27</sup> Prosecutor’s Response, para. 16.

<sup>28</sup> Prosecutor’s Response, para. 19.

<sup>29</sup> Prosecutor’s Response, para. 19.



“was based on” a ruling that a case was admissible or inadmissible.<sup>30</sup> The French version of article 82 (1) (a) of the Statute confirms this interpretation as it provides that a party may only appeal a “[d]écision sur la compétence ou la recevabilité”.

16. The Appeals Chamber’s reading of the plain meaning of article 82 (1) (a) of the Statute is also confirmed by its relationship with other provisions of the Statute. Article 82 (1) (a) of the Statute must be read in conjunction with articles 18 and 19 of the Statute. Article 18 (4) of the Statute provides that the State concerned or the Prosecutor may appeal to the Appeals Chamber against a preliminary ruling of the Pre-Trial Chamber regarding admissibility in accordance with article 82 of the Statute. Article 19 of the Statute provides that the Court may decide on the admissibility of a case either on its own motion, on request of the Prosecutor or in response to a challenge brought by certain specified persons or States. Article 19 (6) of the Statute provides that “[d]ecisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82”. In the view of the Appeals Chamber, the specific references to article 82 of the Statute and the use of identical language in articles 19 (6) and 82 (1) (a) of the Statute indicate that the right to appeal a decision on jurisdiction or admissibility is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber issues a ruling specifically on the jurisdiction of the Court or the admissibility of the case.

17. The Appeals Chamber has also previously held with respect to appeals under article 82 (1) (b) of the Statute that the “effect or implications of a decision confirming or denying the charges do not qualify or alter the character of the decision”.<sup>31</sup> The Appeals Chamber finds that the same logic applies to appeals under article 82 (1) (a) of the Statute. It is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82 (1) (a) of the Statute. Even if the ultimate impact of a decision of a Pre-Trial or Trial Chamber were to affect the admissibility of cases, that fact would not, in and of itself,

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<sup>30</sup> *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’”, 13 July 2006, ICC-01/04-169 (OA), para. 18.

<sup>31</sup> *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la confirmation des charges’ of 29 January 2007”, 13 June 2007, ICC-01/04-01/06-926 (OA 8), para 15.

render the decision a “decision with respect to [...] admissibility” under article 82 (1) (a).

18. The Impugned Decision concerned solely a request by Kenya for assistance pursuant to article 93 (10) of the Statute and rule 194 of the Rules of Procedure and Evidence. The Pre-Trial Chamber limited its consideration to whether Kenya had met the requirements of article 93 (10) of the Statute.<sup>32</sup> The Pre-Trial Chamber found that Kenya did not meet these requirements and therefore dismissed the Request for Assistance.<sup>33</sup> The Pre-Trial Chamber neither decided on the admissibility of any case pursuant to article 19 of the Statute nor issued a preliminary ruling on admissibility pursuant to article 18 of the Statute. To the contrary, the Pre-Trial Chamber found that the Request for Assistance was not linked to the admissibility of pending cases and proceeded to rule on these distinct issues in separate decisions.<sup>34</sup>

19. The Appeals Chamber observes that Kenya itself submitted that the Request for Assistance should be resolved “independent[ly] of” the Pre-Trial Chamber’s determination of the admissibility of any cases.<sup>35</sup> On appeal, Kenya further acknowledges that its challenge to the admissibility of pending cases “is, of course, not at all, dependent on” the resolution of its Request for Assistance.<sup>36</sup>

20. In the present circumstances, it is not disputed that the Impugned Decision concerned solely the Request for Assistance and did not constitute a determination as to the admissibility of any cases or a preliminary ruling on admissibility. Even if resolution of the Request for Assistance in Kenya’s favour might have ultimately contributed in some way to a finding of inadmissibility of cases in the future, this would not render the Impugned Decision a decision with respect to admissibility as that term is used in articles 19 (6) and 82 (1) (a) of the Statute. As the Prosecutor correctly points out, if, as Kenya submits, refusal to decide on or to grant the Request

<sup>32</sup> Impugned Decision, paras 24-33.

<sup>33</sup> Impugned Decision, para. 33.

<sup>34</sup> Impugned Decision, para. 24 (citing *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 May 2011, ICC-01/09-01/11-101, paras 34-35 and *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 May 2011, ICC-01/09-02/11-96, paras 30-31).

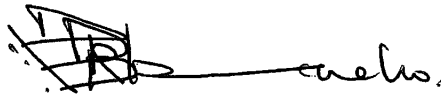
<sup>35</sup> Request for Assistance, para. 7.

<sup>36</sup> Appeal, para. 7.

for Assistance constitutes a procedural error vitiating a decision with respect to admissibility, then it is Kenya's right to raise such error in its appeal against that decision with respect to admissibility, as it has in fact done in the two pending cases.<sup>37</sup> It does not, however, entitle Kenya to bring a separate appeal against the Impugned Decision on the basis of article 82 (1) (a) of the Statute.

21. For the aforementioned reasons, the Appeals Chamber concludes that the Impugned Decision does not constitute a "decision with respect to admissibility" pursuant to article 82 (1) (a) of the Statute. The Appeals Chamber finds the Appeal inadmissible and, therefore, dismisses the Appeal *in limine*.

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



**Judge Daniel David Ntanda Nsereko**  
**Presiding Judge**

Dated this 10<sup>th</sup> day of August 2011

At The Hague, The Netherlands

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<sup>37</sup> See *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, "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, ICC-01/09-01/11-135, paras 70-78; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, "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, ICC-01/09-02/11-130, paras 70-78.