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

Date: 20 May 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul, Judge
Judge Cuno Tarfusser, Judge

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY
AND JOSHUA ARAP SANG

PUBLIC

**Response on behalf of Mr. William Samoei Ruto and Mr. Joshua Arap Sang to the
'Application for an Oral Hearing Pursuant to Rule 58(2)'**

Source: Defence

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

The Office of the Prosecutor

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Counsel for Joshua Arap Sang:
Joseph Kipchumba Kigen-Katwa, Joel
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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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States' Representatives

Sir Geoffrey Nice QC
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Counsel Support Section

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Procedural History

1. The Government of the Republic of Kenya (the Government) filed its challenge to the admissibility of the case on 31 March 2011.¹ In its challenge, the Government also requested the Chamber to convene a status conference to organise the proceedings for the admissibility challenge, and to participate in the initial appearance.
2. On 4 April 2011, the Pre-Trial Chamber issued its '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 Chamber ordered the parties to file their response to the admissibility challenge by 28 April 2011.²
3. The Pre-Trial Chamber also rejected the Government's request for a Status Conference and to participate in the initial appearance. As concerns the former request, the Chamber stated that the "Chamber, being keen to expedite the proceedings and avoid any unnecessary delay, deems it sufficient to confine the engagement of the parties in the article 19 proceedings to providing written observations as dictated by rules 58(3) and 59(3) of the Rules".³
4. For the request to attend the initial appearance, the Chamber referred to the limited scope of the initial appearance and rejected it on that basis.⁴

¹ 'Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute', ICC-01/09-01/11-19.

² 'Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute', ICC-01/09-01/11-31.

³ At para 10.

⁴ At para 11.

5. On 18 May 2011, the Government filed an 'Application for an Oral Hearing Pursuant to Rule 58(2)' (the Government Application),⁵ in which the Government requested the Chamber to convene an oral hearing prior to its determination of the admissibility challenge.
6. Regulation 24(1) of the Regulations of the Court permits the Defence to file a response to any document filed by a participant in the case.
7. The Defence of Mr. Ruto and Mr. Sang hereby files its response, in which it fully endorses the Government Application.

Submissions

8. In terms of the Pre-Trial Chamber's commendable desire to ensure the expeditiousness of the proceedings, an oral hearing will expedite proceedings and facilitate the decision making process of the Chamber by focusing on the issues in dispute, and allowing the Government and parties to clarify and expand on any issues which may be unclear.
9. It will also allow the Government and the parties to adduce oral evidence, under oath. Whilst parties and participants may rely on documentary evidence before the ICC, the jurisprudence of the Court has consistently held that documentary evidence has less weight than oral testimony.⁶ Moreover, Trial Chamber III underscored in the Bemba case that in light of the principle of orality in article 69(2) of the Statute, a party raising abuse of process issues in connection with an admissibility challenge had a responsibility to seek the

⁵ ICC-01/09-01/11.

⁶ See for example, Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, at paras 48-53.

authorization of the Chamber to rely on documentary evidence if they did not intend to tender such evidence through a witness.⁷

10. Given the fact that the Government has conceded that it bears the burden of proof, it should be accorded a fair procedural opportunity to meet this burden by adducing all relevant evidence, including live testimony, and demonstrating the reliability and relevance of documentary evidence by tendering it through a witness.

11. To the extent that the possible transfer of the case to the Kenyan domestic authorities could also impact on the right of the Defendants to a fair and impartial trial in Kenya, the convocation of an oral hearing will enable the Defence to question any witnesses called by the Government. This will ensure that the Defence can assess the ability of Kenyan domestic institutions to accord the Defendants a fair and impartial trial, and, in turn, bring to the attention of the Chamber any relevant concerns regarding the impact of the Chamber's decision on the rights of Mr. Ruto and Mr. Sang.

12. The ICC has also evidenced a consistent practice of granting state parties a right to audience for any matters that affect their competence.⁸ This also takes

⁷ "Documents, most particularly if they are unsupported by any evidence from the witness box, require the leave of the Court before they can be relied on; this is to ensure that they will be probative of the issues under examination and that they are, at least on a prima facie basis, sufficiently reliable". Prosecutor v. Bemba, 'Decision on the Admissibility and Abuse of Process Challenges', ICC-01/05-01/08-802, 24 June 2010, at para 254.

⁸ In addition to the admissibility related decisions referred to by the Government at footnote 16 of its Application, the Defence refers to the following case law: Prosecutor v. Katanga and Ngudjolo, 'Order convening a status conference (regulation 30 of the Regulations of the Court)', ICC-01/04-01/07-2868, 5 May 2011, "In light of all the submissions, and considering that a number of issues remain to be elucidated for it to rule in full knowledge of the facts, the Chamber convenes a status conference, to which the authorities of the host State are invited. The host State authorities shall, *inter alia*, address the legal status of the three detained witnesses with effect from their arrival in the Netherlands and shall state the extent of their jurisdiction over the witnesses" at para 14; See also Prosecutor v. Bemba, 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', ICC-01/05-01/08-475, 14 August 2009, at paras 90-93, in which the Single Judge recognized that the totality of the

into consideration the fact that State parties cannot be expected to be completely acquainted with ICC case law and procedures, and might thus be able to better express their views in the context of an oral court hearing, as opposed to the procedural confines of a written filing.

Relief Sought

13. For the reasons set out above, the Defence of Mr. Ruto and Mr. Sang request the Honourable Pre-Trial Chamber to grant the Government Application.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua Arap Sang and Mr. William Samoei Ruto

Dated this 20th day, May 2011

At Nairobi, Kenya.

views of the States was not necessarily reflected in their written observations, and therefore decided that it was vital to convene a public hearing so that all relevant issues could be discussed thoroughly.