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

Date: 12 July 2011

IN THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

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

PUBLIC

Defence response to the Government of the Republic of Kenya's "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"

Source: Defence of General Mohammed Hussein Ali

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

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Victims Participation and Reparations

Other

Introduction

1. The Defence of Mohammed Hussein Ali submits this response pursuant to Regulation 64(4) in support of the grounds of appeal advanced by the Government of the Republic of Kenya “GoK” as set forth herein.
2. The Defence urges the Appeals Chamber to overturn or reverse the Pre-Trial Chamber II’s Admissibility Decision and declare the case inadmissible before the ICC or, in the alternative, remand the Admissibility Challenge to the same Pre-Trial chamber or a reconstituted Pre-trial Chamber for redetermination.
3. Further, the Defence reiterates its position as contained in “The Response of General Mohammed Hussein Ali to the ‘Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute’”¹ that it reserves its rights to “raise legal challenges envisaged under the Statute, including applications pursuant to Article 19 of the Statute.”²

Procedural history

4. On 6 April 2011, the GoK filed the “Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute”³ requesting Pre-Trial Chamber II “PTC” to determine that the cases against the six persons for whom summonses to appear have been issued, were or are inadmissible (the “Admissibility Challenge”).
5. On 4 April 2011, the PTC issued “Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya pursuant to Article 19 of the Rome statute”⁴ wherein the PTC invited the Prosecutor, the Defence and the OPCV to submit written observations in respect of the Admissibility Challenge by 28 April 2011.

¹ ICC-01/09-02/11-70

² *Id.*, para. 6.

³ ICC-01/09-02/11-26

⁴ ICC-01/09-02/11-40

6. On 21 April 2011, the GoK filed the “Filing of Annexes of Materials to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute.”
7. On 28 April 2011, the parties: the three Defence teams and the Prosecutor and the OPCV filed their responses to the Admissibility Challenge.
8. On 2 May 2011, the GoK submitted its “Application on behalf of the Government of Kenya for leave to reply to responses filed by the parties on 28 April 2011 in light of the responses being filed and of no decision being rendered in respect of the Government’s filing of 11 April 2011 requesting a direction on its right to reply.”⁵ On the same day the GoK request for leave to reply was granted.
9. On 13 May 2011, the GoK submitted its reply to the responses of the parties.
10. On 17 May 2011, the GoK submitted an application requesting for an oral hearing wherein it requested the PTC to rule on its application before it rendered its final decision on the Admissibility Challenge.
11. On 30 May 2011, the PTC issued its “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 (the “Admissibility Decision”) wherein the PTC found the case admissible before the Court. In the same decision, the Chamber rejected the GoK’s application for an oral hearing.⁷
12. On 6 June 2011, the GoK submitted its Appeal against the PTC’s Admissibility Decision.⁸

⁵ ICC-01/09-02/11-76

⁶ ICC-01/09-02/11-96

⁷ *Id.*, para. 32-38

⁸ 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 June 2011.

Submissions

a. Errors of fact

13. The Defence supports this ground of appeal as advanced by the GoK that the PTC incorrectly held that there was investigative inactivity concerning the case. In finding that there was “inactivity”, the PTC wrongly based its conclusion on (i) the GoK’s legal arguments concerning the definition of a case; (ii) the GoK’s promise to submit future staged investigative reports; and that (iii) the letters and reports submitted by the GoK only concerned future investigative activity.
14. In its decision, the Pre-Trial Chamber reached a conclusion that from the GoK’s arguments concerning the definition of a case it meant that they were not necessarily investigating these particular suspects.⁹
15. In so doing, the Chamber failed to take into consideration the fact the government’s legal arguments were being submitted in the alternative, and without prejudice to clear undertakings that the national authorities were investigating these particular 6 defendants.
16. Further, the Defence opines that the GoK’s submissions in regard to what constitutes a case were within its rights to fully litigate all aspects of the legal test for admissibility, irrespective of whether it was necessary for them to do so in order to establish the inadmissibility of the case before the ICC. As will be submitted in this filing, the legal standard for what constitutes a case was not set by the Appeals Chamber as inferred by the PTC.
17. Notwithstanding the GoK’s submissions in regard to the test of what constitutes a case, the Defence notes that the GoK provided information showing investigations into the 6 accused persons.¹⁰ Further, it is noteworthy

⁹ Prosecutor v. Kenyatta et al, 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-01/09-02/11-96, at para 56.

¹⁰ In paragraph 71 of the GoK challenge the GoK states that “[a]n updated report on the state of these investigations and how they extend upwards to the highest levels and to all cases, including those presently before the ICC, will be submitted by the end of July 2011.

that in the GoK Reply, the GoK emphasised that there were indeed investigations into the six suspects.¹¹

18. On the second basis for the PTC's finding of "inactivity" the PTC incorrectly inferred from the GoK's promise to submit investigations reports that no investigations were presently underway. In stating that, "so far, the alleged ongoing investigations have not yet extended to those at the highest level of hierarchy, be it the three suspects subject to the Court's proceedings, or any other at the same level"¹² the PTC disregards the GoK submissions that investigations were underway and what was to be provided was an update. The PTC incorrectly infers that investigations should have been completed at the time of filing the admissibility challenge.

19. The GoK, in the Admissibility Challenge, submitted that investigations into the six suspects were to be completed by end of September 2011.¹³ It should be noted that the Rome Statute does not require completeness of investigations by state authorities before challenging admissibility.¹⁴ Further, there is no requirement that national investigations must be as advanced as the Prosecution investigations. Were it to be so, such a requirement would undermine the very basis for the existence of the court (complementarity

¹¹ At para30 and 31, the GoK states, 30. "The Government of Kenya made clear in its Application and supporting Annexes that an investigation, including into the six suspects, was presently underway.

31. There has been an investigation underway by the Kenyan authorities which covered the six suspects since shortly after the Post-Election Violence; the six suspects are presently a focus of the investigation. The historical development of this investigation, and in particular its relation to the work and recommendations of the Waki Commission, is detailed below (see sub-section (iii)). Most importantly, since being named by the ICC Prosecutor the six suspects have been a focus of the national investigation which continues at the present moment.¹⁶ The Commissioner of Police, Mathew Iteere, is directing this investigation which is being carried out by a dedicated team, further details of which are set out below (see sub-section (iv)). Should there be any questions raised about the genuineness of this investigation which covers the six suspects, the Commissioner is ready to appear before the Pre-Trial Chamber to confirm and explain the investigative work that is presently being undertaken, the background to this investigation, and his commitment to investigate thoroughly all allegations to their conclusion as soon as possible. He has simply never been approached by the ICC Prosecutor to discover what he and his police have been doing. As he asserts - and would testify - any evidence once provided to him concerning any of the six suspects would be acted on immediately, objectively and dispassionately." (Emphasis added)

¹² Admissibility Decision, para. 58

¹³ Admissibility Challenge, para. 13

¹⁴ Indeed, such a requirement would be inconsistent with the fact that the ICC Appeals Chamber has held that the ICC Prosecutor is not required to conclude its investigations before either seeking an application for an arrest warrant or summons, or prior to the confirmation hearing. Prosecutor v. Lubanga, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568.

being a key pillar) by creating competition between the Court and national authorities.

20. On the third basis for finding “inactivity”, the PTC incorrectly applied an unduly high evidentiary standard on the statements submitted by the Gok. It is noteworthy, as submitted by the GoK in its Appeal Brief, that in accordance with the jurisprudence of this Court, the statements of State parties should be accepted by the Chamber as being accurate and in good faith unless there is compelling evidence to the contrary.¹⁵

21. The PTC also erred by finding that since there was no evidence that the State had taken concrete investigative, such as questioning the suspect (notwithstanding the fact that the suspects have an absolute right of silence vis-a-vis national authorities by virtue of article 55 of the Statute) then there was no investigative activity. The Chamber refused to convene a status conference or oral hearing to accord the GoK an opportunity to present further information concerning the investigations.

22. Further, the Defence submits that requiring a State party to provide the specific details of its investigative findings before such findings have been submitted before judicial authorities is an extremely intrusive step which goes beyond the parameters for a proper determination of an admissibility challenge.

23. The Defence notes that when the PTC in the DRC Situation issued an order convening a status conference to discuss the progress of the investigations, the

¹⁵ See also Prosecutor v. Katanga and Ngudjolo, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213, 16 June 2009, at para 80 and 88. Prosecutor v. Bemba, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, 24 June 2010 at para 235.

Prosecutor v. Katanga and Ngudjolo, Decision on the security situation of three detained witnesses in relation to their testimony before the Court (art. 68 of the Statute) and Order to request cooperation from the Democratic Republic of the Congo to provide assistance in ensuring their protection in accordance with article 93(1)(j) of the Statute 22 June 2011 ICC-01/04-01/07-3033 at para 40: “although such diplomatic assurances cannot substitute an independent risk-analysis by the Court under article 68 of the Statute, they must incontestably be treated with the greatest respect and must be presumed to have been made in good faith. The Chamber observes, in this regard, that the above-mentioned assurances are given within the general legal framework for cooperation between the Court and the DRC under Part IX of the Statute. As was correctly pointed out by the DRC, this framework is based on mutual trust and on the ultimate supervision and control of the Assembly of States Parties. The formal assurances given by the DRC authorities therefore carry great weight, as they commit the DRC not only vis-à-vis the Court but also to the Assembly of States Parties.”

ICC Prosecutor strenuously objected and expressed its concern regarding the impact of such scrutiny on the impartiality of the proceedings.¹⁶ It cannot be concluded from the fact that the Prosecutor was unwilling discuss its specific investigative findings and strategies in a status conference that the Prosecutor was not conducting any investigations, as demonstrated by the fact that the Prosecution subsequently submitted a request for an arrest warrant against Thomas Lubanga Dyilo.

b. Procedural errors

24. The Defence supports the GoK contention that the PTC committed procedural errors in the determination of the Admissibility Challenge which errors impacted on the decision itself. The Defence agrees that the PTC erred in refusing to allow the GoK to submit staged investigation reports contrary to the jurisprudence of this Court and that it erred in refusing the GoK request to convene an oral hearing.

25. The Defence notes the jurisprudence of the Appeals Chamber in regard to determination of whether a case is inadmissible. Core in this, as laid down by the Appeals Chamber, are answers to two questions before considering other aspects. It stated :

Therefore, in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are *ongoing investigations* or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned.¹⁷
(Emphasis added)

26. The Defence therefore submits that the PTC committed an error that denied the GoK an opportunity to have a proper determination of its Admissibility Challenge. Such an opportunity could only have been provided if the GoK was allowed to provide all evidence in stages to enable the PTC properly answer the question whether there were “ongoing investigations”.

¹⁶ DRC situation, ‘Submission of the Redacted Version of the Prosecutor’s Position on Pre-Trial Chamber I’s 17 February 2005 Decision to Convene a Status Conference’, 11 March 2005, ICC-01/04-12- Anx.

¹⁷ Prosecutor v. Katanga and Ngudjolo, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, at para 78

27. Without properly taking into consideration all the information, the Defence submits that the PTC was not in a position to properly determine the Admissibility Challenge and hence the Appeals Chamber should find that the PTC's findings in the impugned decision cannot hold.
28. The Defence further recalls the jurisprudence of the Appeals Chamber that determination as to whether the case is or is not admissible must be, "on the basis of the facts as they exist at the time of the time of the proceedings concerning the admissibility."¹⁸ The Defence submits that the term proceedings implies that the Chamber must base its decision on all information and evidence which is submitted to it prior to its determination. The PTC was therefore not limited to taking into consideration only the information submitted by the GoK in its initial application but also any evidence submitted subsequently.
29. It is noteworthy that neither the Statute, Rules or Regulations prescribe the procedure for admissibility proceedings in terms of the modalities or deadlines for submitting evidence. Rule 58(2) provides that the Chamber seized of the request "shall decide upon the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings."
30. The Defence agrees with the GoK that the rejection by the PTC to convene an oral hearing was a procedural error which impacted upon the admissibility proceedings and in accordance with the jurisprudence of the Appeals Chamber the same can be challenged as part of the appeal of the ultimate decision on admissibility.¹⁹
31. At the outset, the Defence agrees with the GoK that the PTC incorrectly conflated the GoK's request for a status conference with its request for an oral hearing. The purpose of the requested oral hearing was to canvass all arguments concerning the substance of the Admissibility Challenge while the requested status conference was to "...discuss the time table as set out in the

¹⁸ *Id* at para 56.

¹⁹ See Prosecutor v. Bemba, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse, 19 October 2010, ICC-01/05-01/08-962, at para 101.

Application and for submissions from the parties to be made on procedure so that the Pre-Trial Chamber can make orders and directions in accordance with Rules 58 and 59...”²⁰

32. The Defence submits that the PTC’s decision to reject a request for an oral hearing fundamentally prejudiced the GoK and which prejudice went to the core of the decision on the Admissibility Challenge. First, it is noteworthy from the various aspects of the PTC decision pointed out herein that the conclusions reached were based on a misappreciation of the Gok submissions which could have been clarified in an oral hearing.

33. Second, the rejection of a requested oral hearing deprived the GoK of an opportunity to provide more information by adducing all relevant evidence including live testimony and demonstrating the reliability and relevance of documentary evidence by tendering it through a witness. The Defence notes that whilst parties and participants may rely on documentary evidence before the Court, the jurisprudence of the Court has consistently held that documentary evidence has less weight than oral testimony.²¹

34. The Defence further notes that the rejection to convene an oral hearing was inconsistent with previous practice by the Court in granting State parties a right of audience for any matters that affect their competence.²²

²⁰ Para 21, Admissibility Challenge.

²¹ 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.

²² See 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, where the Chamber stated, “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 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.

c. Errors of law

35. The Defence agrees with the GoK that the PTC erred in finding that the only test to be applied in the determination of admissibility is the “same conduct, same person” test.²³ The PTC incorrectly held that this test was applicable because the Appeals Chamber had implicitly endorsed its applicability, as had other Pre-Trial Chambers.

36. First, the Defence notes that the Appeals Chamber in the Katanga admissibility proceedings declined to rule on the correctness of this test for reasons that “...the question of whether the “same-conduct test” is correct is not determinative for the present appeal.” To the extent that the PTC held that the Appeals Chamber had endorsed this test, it was incorrect.

37. Second, in terms of the jurisprudence of other Pre-Trial Chambers, the Defence submits that the same were not binding on the PTC in considering the submissions of the GoK. As expressly recognised by the Single Judge in another decision, “the usage of the word ‘may’ in article 21(2) of the Statute provides the Chamber with the discretion as to whether to follow previous precedents. Consequently, the provision as drafted rejects the *stare decisis* doctrine.”²⁴

38. Consequently, the PTC erred in failing to consider the submissions by the GoK in accordance with the hierarchy of applicable laws under article 21 of the Statute.

39. The Defence notes that none of the decisions from the Chambers cite any authority for the “same person/same conduct” test. The Defence submits that this test is inconsistent with the objects and purpose of the Statute.

40. The same person/same conduct test is predicated on the underlying assumption that the ICC prosecution has successfully identified the perpetrators, who bear the most responsibility, and potentially, the sole

²³ Admissibility Decision, para. 53.

²⁴ See Prosecutor v. Uhuru Muigai Kenyatta et al, Decision on the "Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (ICC-01/09-02/11-48)", ICC-01/09-02/11-77, 2 May 2011, at para 23.

responsibility for the crimes in question (which is the case for charges of co-perpetration or command responsibility, as there can only be a finite number of persons who made an essential contribution to the commission of the crime and had the power to frustrate its execution, or who exercised de jure or de facto authority over the physical perpetrators).

41. The Defence submits that this assumption completely violates the presumption of innocence. It might also simply be the case that the OTP has failed to identify the correct perpetrator. If the Kenyan authorities have evidence, which demonstrates that another person should be prosecuted in the stead of the ICC defendants, would justice be served if Kenyan courts had to wait until after the ICC had reached a verdict on the case before it could pursue the matter (if, indeed it could)? At the same time, it would not be feasible to conduct simultaneous prosecutions because the evidential record would suffer by being divided between two prosecuting authorities.

42. This specific scenario arose at the ICTY, in connection with a request from the ICTY Prosecutor that the Macedonian authorities defer a specific case (the Mavrovo Road Workers case) to the competence of the ICTY. The Macedonian authorities had initiated proceedings against two specific individuals in connection with certain events.²⁵ The ICTY prosecutor requested the Chamber to order the Macedonian authorities to defer to the competence of the ICTY as concerns the case, but at the same time, the Prosecution informed the Chamber that the ICTY Prosecutor would not be pursuing charges against the same two individuals due to lack of evidence. The ICTY Prosecutor nonetheless submitted that the effect of the deferral would be that the Macedonian authorities would be precluded from continuing their proceedings against the two individuals. The ICTY Prosecutor justified the request on the basis that:

“parallel investigations of the same acts by the Prosecutor and the Macedonian authorities at the same time, however, may

²⁵ ‘Decision on the Prosecutor’s Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia IT-02-44-Misc. 6, 4 October 2002.

have serious negative implications and may ultimately jeopardize the success of the Prosecutor's investigations. In particular, the Prosecutor fears that multiple interviews of witnesses by different investigating parties create the risk that conflicting statements may arise and that witnesses be antagonised. Further, the seizure and analysis of physical and forensic evidence by the domestic authorities may compromise the Prosecutor's ability to analyse the same evidence. Due to the potentially different investigative procedures of the two investigating parties, the acts of the Macedonian authorities could also compromise or taint subsequent investigative efforts by the Prosecutor".²⁶

43. The Chamber granted the Prosecutor's request for deferral, although it requested the ICTY Prosecutor and national authorities to consult with a view to deciding upon a mechanism which would minimize the blocking effect for national prosecutions.²⁷ In deciding upon the relationship between the domestic proceedings and the ICTY proceedings, the ICTY did not require the cases to relate to identical incidents; it was sufficient if the incidents were 'closely related' to the domestic proceedings.²⁸

44. It is also notable that different ICC Chambers have recognized that in line with the presumption of innocence, and the fact that the Chamber has not yet reached a final determination of the personal responsibility of the defendant, it would be inappropriate to require victims requesting to participate in the case to identify the ICC defendant as the person responsible for the harm that they have suffered. For example, in the Kony case, the Pre-Trial Chamber found that a victim had suffered harm as a result of the charges, and should therefore be granted the right to participate in the case, notwithstanding the

²⁶ At para 12.

²⁷ At para 39-41.

²⁸ Decision on the Prosecutor's Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia IT-02-44-Misc. 6, 4 October 2002 at para 41.

fact that the victim had identified the UPDF and not the LRA as being responsible for the attack in question.²⁹

45. Similarly, in the Bemba case, the Trial Chamber has stated that it is unnecessary to either identify the physical perpetrators or attribute responsibility to the defendant for the purpose of establishing that the harm suffered by the victim is related to the case.³⁰

46. It would defeat the purpose of complementarity for the ICC to utilize a broad definition of a 'case' for the purpose of exercising jurisdiction over harm suffered by alleged victims, but a very narrow definition for the purpose of determining whether a sovereign State can exercise jurisdiction over the harms suffered by its own nationals.

47. The Defence therefore concludes that the "same person/same conduct" test is incorrect and the PTC erred in relying on the same.

Relief Sought

48. For the foregoing reasons, while reserving its rights as stated in paragraph 3 above, the Defence supports the prayers sought by the GoK and requests the Chamber to:

- a) Overturn the PTC's Admissibility Decision and hold that the case is not admissible before the ICC;
- b) In the alternative, to remand the Admissibility Challenge to the existing PTC or a reconstituted PTC to determine the same within the correct parameters.

²⁹ Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, 10.08.2007, paras 72-76.

³⁰ Decision on 653 applications by victims to participate in the proceedings, ICC-01/05-01/08-1091, 23 December 2011, at para 27.

Respectfully submitted,



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On behalf of Mohammed Hussein Ali

Dated this 12th day of July, 2011

At Nairobi, Kenya