

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **19 July 2011**

IN THE APPEALS CHAMBER

Before: Judge Daniel David 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. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY
AND JOSHUA ARAP SANG

PUBLIC

**Observations on behalf of Henry Kiprono Kosgey 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”**

Source: Defence

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
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**The Office of Public Counsel for
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Introduction

1. On 20 June 2011, the Republic of Kenya filed the “Decision 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” (“Document in support of the Appeal”), in which it indicated that it would “file updated reports on the investigation during the appellate proceedings”.¹

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” (“Updated Investigation Report”).² In this filing, Kenya requests the Appeals Chamber to “accept this Report as further confirmation that the national investigation into the six suspects is ongoing and progressing expeditiously”.³ Kenya justifies its submission of the Updated Investigation Report on the basis that “[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”.⁴ The Republic of Kenya also submits that the Updated Investigation Report sets out the next steps that will be taken in the investigation (which will be reported on in the next Updated Report) and therefore the Updated Investigation Report should be accepted as “further unequivocal evidence of the Government of Kenya’s intentions and of its conduct in currently investigating the six ICC suspects”.⁵

¹ ICC-01/09-01/11-135 (Corrigendum filed on 21 June 2011), para 52.

² ICC-01/09-01/11-159.

³ Updated Investigation Report, para 3.

⁴ Ibid.

⁵ Updated Investigation Report, para 4.

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” (“Response to the Document in Support of the Appeal”).⁶ In its Response the Prosecutor states that “the Appeals Chamber should dismiss this report *in limine*” for four reasons. First, Kenya is presenting additional evidence without first filing an application to do so as required by regulation 62 of the Regulations of Court. 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. Third, the Report provides no proof of concrete investigative steps against the suspects in this case. Fourth, the report is unclear, inconsistent and lacks probative value.⁷
4. On 14 July 2011, the Presiding Judge of the Appeals Chamber, Judge Daniel David Ntanda Nsereko, ordered Mr Ruto, Mr Kosgey and Mr Sang to “file any observations they may have as to whether the Updated Report should be accepted or should be dismissed *in limine*” by 10:00am on Tuesday 19 July 2011.
5. In short, it is the Kosgey Defence’s position that the Updated Investigation Report should be accepted by the Appeals Chamber and considered as part of its deliberations on 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 ICC-01/09-01/11-183.

⁷ Response to the Document in Support of the Appeal, para 35.

Defence Position on the Updated Investigation Report

6. The Defence for Henry Kosgey submits that the Updated Investigation Report should be accepted by the Appeals Chamber for three reasons. First, it is right and proper that the Appeals Chamber should take into account the current situation in Kenya when determining the Kenyan Government's appeal as to admissibility. Second, consideration of the Updated Investigation Report will assist with the Appeals Chamber's review of the Single Judge's alleged procedural error in failing to allow the Kenyan Government to submit updated investigation reports before the Pre-Trial Chamber. Third, the requirements of regulation 62 as to seeking and obtaining leave to present additional evidence before the Appeals Chamber are complied with in substance if not in form. Fourth, the Updated Investigation Report does indicate that concrete steps have been taken by the Kenyan investigative authorities and that investigations are ongoing in relation to the six persons accused by this Court. Each will be dealt with in turn.

I. The Appeals Chamber should take into account the current situation in Kenya when determining the admissibility challenge

7. As the Appeals Chamber has previously held, determination of the admissibility of the case must be made:

“on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17(1)(a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time. Thus, a case that was originally admissible may be rendered

inadmissible by a change of circumstances in the concerned States and vice versa".⁸

8. The Appeals Chamber has held that interlocutory appellate proceedings are distinct from the proceedings before the Pre-Trial Chamber.⁹ It thus follows that since the Chamber must determine admissibility on the basis of the facts as they exist at the time of proceedings in question, the Appeals Chamber ought to base its Judgement on the facts which exist at the time of the interlocutory appeal.
9. In light of this jurisprudence, it therefore would not be proper for the Appeals Chamber to confine its consideration of the Government of Kenya's admissibility challenge to the background facts which were extant when the matter was being determined by the Pre-Trial Chamber.

II. The Updated Investigation Report will shed light on the Single Judge's alleged procedural error

10. It will be recalled that a key component of the Government's appeal is that the Single Judge erred by failing to allow the Government to submit updated investigation reports in support of its admissibility challenge before the Pre-Trial Chamber. One of the suggested pretexts for this alleged error is that due to issues concerning witness protection and national security, the type of information contained in such updated investigation reports could not be readily provided in an *inter partes* filing to be submitted at the time of the Government's filing of its initial admissibility challenge. Accordingly, accepting and considering the present Updated Investigation Report would allow the Appeals Chamber to gauge the type of information contained within

⁸ *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 56.

⁹ *Prosecutor v Lubanga*, Judgement on the Appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Decision sur la demande de mise en liberte provisoire de Thomas Lubanga Dyilo", ICC-01/04-01/06-824, 13 February 2007.

it and as a corollary: (1) whether or not the Government ought to have provided this information as part of its initial application; (2) whether the Government has incurred prejudice as a result of the Single Judge's refusal to consider updated investigation reports; and (3) the likely impact of this refusal on the Pre-Trial Chamber's Decision as to Admissibility. For these reasons, the acceptance of the Updated Investigation Report at the appellate stage is highly material in determining whether or not the procedural errors alleged in the Appeal by the Government of Kenya are in fact made out.

III. The requirement to seek leave to present additional evidence is complied with in substance if not in form

11. Regulation 62 of the Regulations of Court provides that an appellant seeking to admit additional evidence may file an application setting out: (a) the evidence to be presented; and (b) the ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not submitted before the Trial Chamber. Although the Government of Kenya does not cite regulation 62 in the Updated Investigation Report, its contents are fully compliant with this regulation in that the Government has included the evidence to be presented, has linked the evidence to a relevant appellate ground (the Pre-Trial Chamber's error in concluding that there was insufficient evidence as to existing investigations),¹⁰ and has explained why the evidence was not available during the proceedings before the Pre-Trial Chamber (the author of the report was appointed after the Pre-Trial Chamber rendered its Decision).¹¹

12. The Defence submit that a substance over form approach is to be favoured in the present circumstances. Indeed the Appeals Chamber has previously held that a failure to cite the legal basis for an application to submit additional information to the Appeals Chamber is not fatal to the application.

¹⁰ Updated Investigation Report, para 4.

¹¹ Updated Investigation Report, para 2.

13. Moreover, under Article 19(4) the State has a right to mount an admissibility challenge only once. Accordingly, should any relevant evidence to the admissibility challenge which has occurred in the course of the proceedings or after the determination by the Chamber, the proper means of considering such evidence is through adducing of such additional evidence before the Appeals Chamber.

14. While the appropriate mode of adducing such evidence is through Regulation 62, the Appeals Chamber is granted wide discretion on the matter and has the right to make a determination so long as the requirements of Regulation 62(1)(a) and (b) are met within the Application filed before the Appeals Chamber. The Defence therefore prays that the Updated Investigation Report filed by the Government of Kenya be treated as an Application to present additional evidence and requests the Appeals Chamber to determine whether the evidence is admissible and if found to be admissible be deemed as filed.

IV. The Updated Investigation Report shows that investigations against the six suspects are indeed ongoing

15. Contrary to the submissions of the Prosecution, the Updated Investigation Report does provide evidence that concrete steps have been taken by the Kenyan investigative authorities in relation to the six persons accused by this Court. It clarifies, *inter alia*, that: (1) a ten person team of senior police officers are working full time in investigating these individuals,¹² (2) 35 witnesses have so far been interviewed in relation to the six suspects,¹³ (3) five witness statements have been taken in relation to the actions of Mr Ruto alone,¹⁴ (4) vast numbers of documents have been reviewed regarding events in the Rift Valley, Nyanza, Western, Nairobi and Coast provinces;¹⁵ (5) Mr Kosgey was

¹² Updated Investigation Report, Annex 1, page 1.

¹³ Updated Investigation Report, Annex 1, page 2.

¹⁴ Updated Investigation Report, Annex 1, page 3.

¹⁵ Updated Investigation Report, Annex 1, page 4.

interviewed as a suspect under Kenyan law on 6 June 2011;¹⁶ (6) further steps are planned to carry on the investigations against the six suspects.¹⁷ This information is highly relevant for the Appeals Chamber's determination of whether or not there are existing investigations ongoing in Kenya for the purposes of admissibility before the International Criminal Court.

The Appeals Chamber's role in providing general guidance as to admissibility

16. Finally, while remaining neutral as to the substance of the Appeal, the Defence for Henry Kosgey also takes this opportunity to respectfully submits to the Appeals Chamber the significance of these issues, not just in determining the admissibility of the Updated Investigation Report, but in offering clarification and guidance to Kenya and other State parties of the Court in establishing standards for when national criminal justice procedures will be sufficient to engage the principle of complementarity. In light of the significant implications of the Government of Kenya's Appeal for both principles of national sovereignty and the development of international criminal law as a whole, the Defence for Henry Kosgey submits that accepting and considering the contents of the Updated Investigation Report is an entirely appropriate measure in ensuring the proper conduct of the appellate proceedings.

Conclusion

17. The Defence therefore suggests that the Appeals Chamber should accept the Updated Investigation Report and that this document ought to be considered as part of its deliberations on 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.

¹⁶ Updated Investigation Report, Annex 1, pages 4-5.

¹⁷ Updated Investigation Report, Annex 1, pages 5-6.



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

Dated this 19 July 2011

At Nairobi, Kenya