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

Date: 19 July 2011

**THE APPEALS CHAMBER**

**Before:** Judge Daniel David Ntanda Nsereko, Presiding  
 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 Mr. William Samoei Ruto and Mr. Joshua Arap Sang  
 to the 'Order on the filing of observations in relation to "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:

**The Office of the Prosecutor**

Luis Moreno-Ocampo, Prosecutor  
Fatou Bensouda, Deputy Prosecutor

**Counsel for William Samoei Ruto**

Joseph Kipchumba Kigen-Katwa,  
David Hooper QC, Kioko Kilukumi  
Musau and Kithure Kindiki

**Counsel for Henry Kiprono Kosgey**

George Odinga Oraro, Julius Kemboy  
and Allan Kosgey

**Counsel for Joshua Arap Sang**

Joseph Kipchumba Kigen-Katwa, Joel  
Kimutai Bosek and Philemon K.B. Koech

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

Sir Geoffery Nice, QC  
Rodney Dixon

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia

**Counsel Support Section**

**Deputy Registrar**

Mr. Didier Daniel Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction & Procedural History

1. On 31 March 2011, the Government of the Republic of Kenya (the “Government”) filed a challenge to the admissibility of the case pursuant to article 19(2)(b) of the Statute (the “Challenge”)<sup>1</sup>, on the grounds that the Kenyan authorities have initiated investigations into the case against the Defendants. The Government therein indicated that it would provide regular updates as to the progress of national investigations.
2. On 28 April 2011, the Defence filed a ‘*Response on behalf of Mr. William Samoei Ruto and Mr. Joshua Arap Sang to the “Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute”*’<sup>2</sup> notifying the Pre-Trial Chamber that it did not oppose the Challenge.
3. On 30 May 2011, Pre-Trial Chamber II issued its ‘*Decision to the Government of Kenya’s Admissibility Application of 31 March 2011*’<sup>3</sup> in which the Chamber rejected the Government of Kenya’s Admissibility Challenge, finding the case admissible before the Court, on the basis that the Government had not provided any evidence that there was an ongoing investigation.
4. On 6 June 2011, the Government of Kenya submitted its ‘*Appeal against the Pre-Trial Chamber’s Admissibility Decision of 30 May 2011*’<sup>4</sup>; on 20 June 2011, the Government submitted a ‘*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”*’<sup>5</sup>.
5. On 4 July 2011, the Government submitted a ‘*Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility*’<sup>6</sup> (“Updated Investigations Report”).
6. On 14 July 2011, the Appeals Chamber ordered the Defence to file any observations as to whether the Appeals Chamber should accept or should dismiss *in limine*, the Updated Investigations Report.<sup>7</sup>

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<sup>1</sup> ICC-01/09-01/11-19.

<sup>2</sup> ICC-01/09-01/11-68.

<sup>3</sup> ICC-01/09-01/11-101.

<sup>4</sup> ICC-01/09-01/11-109.

<sup>5</sup> ICC-01/09-01/11-135 and ICC-01/09-01/11-135-Corr.

<sup>6</sup> ICC-01/09-01/11-159.

<sup>7</sup> ICC-01/09-01/11-183.

7. The Defence of Mr. Ruto and Mr. Sang respectfully informs the Honourable Appeals Chamber that it supports the additional documents filed by the Government of Kenya in relation to its Challenge on Admissibility and requests that the Appeals Chamber consider their substantive content when determining the merits of the Appeal. Alternatively, the Defence requests that the Appeals Chamber remand the issue of admissibility to the Pre-Trial Chamber with instructions to accept Government's Updated Investigations Report of 1 July 2011 as well as anticipated reports of August and September 2011 before reaching a decision.<sup>8</sup>
8. These submissions are without prejudice to the Defence's position that the Government had already adduced sufficient evidence to the Pre-Trial Chamber to establish the inadmissibility of the case before the ICC, even absent the information contained in the Updated Investigations Report.
9. Furthermore, and at the same time, the Defence would like to confirm that in so doing, the Defence is not joining the Challenge of the Government of the Republic of Kenya, but is preserving its right to file submissions on admissibility in an independent manner, should the present Challenge be rejected.

## II. Submissions

### A Determination of Admissibility is an Ongoing Process

10. The jurisprudence regarding the admissibility of cases before the ICC makes it clear that a determination of admissibility is meant to be an ongoing process throughout the pre-trial phase. Thus, the Defence respectfully requests the Appeals Chamber to accept the additional documents in the Updated Investigations Report as proof of the ongoing national investigations and as confirmation of the Government's *bona fides* dedication to this process.
11. Article 17(1)(a) of the Statute provides that the Court shall determine that a case is inadmissible where the "case is being investigated or prosecuted by a State which has

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<sup>8</sup> The Defence notes that in the context of Article 82(1)(d) interlocutory appeals, the Appeals Chamber has confirmed "in circumstances such as the present, the developments that occurred after the Impugned Decision cannot be taken into account for evaluating whether the Impugned Decision was correct. Under article 82(1)(d) of the Statute, the Appeals Chamber is vested with jurisdiction to review certain decisions of the Pre-Trial and Trial Chambers. Any new developments will have to be assessed and evaluated by the Pre-Trial or Trial Chambers". *Prosecutor v. Lubanga*, ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, para. 85.

jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”. By contrast, Article 17(1)(b) provides that the Court shall determine that a case is inadmissible where the case “has been investigated” and the State has decided not to prosecute. The verb tense used in Article 17(1)(a) of the Statute (“is being investigated”) implies that the Court must consider admissibility vis-à-vis an investigative process which is ongoing. It is clear that the Statute intends for a case to be deemed inadmissible in the face of evidence of an ongoing national investigation. As such, evidence to the effect that an investigation is ongoing should be available to the relevant arbiter, whether at first instance or on appeal. Notably, the Appeals Chamber has previously recognized that interlocutory appellate proceedings are distinct from the proceedings before the Pre-Trial Chamber<sup>9</sup>; thus it follows that the Chamber determining admissibility (now the Appeals Chamber) must have before it the facts as they stand at the time of the interlocutory appeal. In this respect, the Prosecutor’s definition of what constitutes the “time of the admissibility challenge”<sup>10</sup> is thus unduly restrictive and defeats the statutorily-enshrined principle of complementarity. As such, and in the interests of justice, the Appeals Chamber should reject it.

12. In the *Katanga and Ngudjolo* case, the Appeals Chamber acknowledged that a case which was previously determined by the Court to be admissible, might subsequently become inadmissible, due to new investigative activities by national authorities.<sup>11</sup> Consequently, the advent of new investigative activities by national authorities should be considered while the issue is still live before the Court, rather than in a separate or renewed admissibility challenge.<sup>12</sup> Doing so would promote judicial economy and would enable the Appeals Chamber to render a more fair determination of the issue on the merits.

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<sup>9</sup> “An interlocutory appeal of this nature, in which a particular issue requires specific consideration, is a separate and distinct stage of the proceedings”. *Prosecutor v. Lubanga*, ICC-01/04-01/06-824, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, 13 February 2007.

<sup>10</sup> ICC-01/09-01/11-183, para. 27 (suggesting that an admissibility challenge is constituted by a single document filed with the Court at a static moment in time).

<sup>11</sup> “Generally speaking, the admissibility of a case must be determined 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.” *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1497, 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, 25 September 2009, para. 56.

<sup>12</sup> The Defence notes some parallels in the approach taken by the Government to provide updates, with the provisions of Article 18(5), to the extent that there, the Statute specifically acknowledges that a State may provide the Prosecutor with updates as to the progress of its investigations for the purposes of determining admissibility.

Updated Investigations Report Contains Information Probative of the Issue on Appeal

13. As a State is statutorily limited in its ability to challenge admissibility,<sup>13</sup> it stands to reason that the Chamber deciding admissibility should have before it all of the information which is probative of the issue before making a determination of that issue. The information contained in the Updated Investigations Report is probative of the issue on appeal, especially given that the Pre-Trial Chamber dismissed the Government's Admissibility Challenge on the basis that there was a situation of "inactivity" with respect to national investigations.
14. The Government had indicated to the Pre-Trial Chamber that it would provide it with updated reports on the progress of investigations, and had requested permission to call the director of the CID to testify as to the specifics of the investigations. The Pre-Trial Chamber dismissed the Challenge before the Government had a chance to file any updated reports and without hearing from the proposed witness. Both of these rejected overtures could have shed light directly on the issue *sub judice* before the Pre-Trial Chamber. Consequently, the Government's Appeal is largely predicated on the notion that the Pre-Trial Chamber hastily and unreasonably denied the Government the opportunity to argue fully its case. Information supporting the argument that had the Pre-Trial Chamber not purposefully deprived itself of relevant information, the outcome of its decision would have been different, is thus directly relevant on appeal.
15. In the Updated Investigations Report, the Government has confirmed that the national authorities, particularly the Director of Criminal Investigations, is investigating persons at the highest levels – which includes the six suspects, and that since the Chamber's Admissibility Decision investigations have indeed progressed.
16. For instance, the Updated Investigations Report clearly shows steps taken by the Government to investigate, including the appointment of an independent Director of Public Prosecutions ("DPP") who was confirmed by Parliament on 20 June 2011. The DPP will work with the Commissioner of Police in the continuing investigation of the six suspects, including Mr. Ruto and Mr. Sang.
17. The Updated Investigations Report also provides significant details with regard to the 2008 case against Mr. Ruto. It states that five witness statements were taken from people who came to the Provincial CID office in Nakuru in June-July 2008. The Defence notes that these are details pertinent to the status of the investigations which preceded even the

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<sup>13</sup> Article 19(4) says that a State may challenge the admissibility of a case or the jurisdiction of the Court only once.

initial filing of the admissibility challenge. Additionally, the Updated Investigations Report outlined the steps currently being taken to follow-up information provided in those statements. Strangely, the investigation team has not been able to locate the people who gave the initial statements and speculates that perhaps they have been relocated by the ICC Prosecutor. If this is the case, and the ICC process is in fact frustrating the possibility and progression of further national investigations, then it would be patently unfair for the Court to dismiss the admissibility application on the basis of “inactivity”. Information contrary to the finding of the Pre-Trial Chamber, which could have been available to the Pre-Trial Chamber had it chosen to avail itself of it, must be made available to the Appeals Chamber for the purpose of determining whether the Pre-Trial Chamber made an error of fact. This is an especially acute proposition with respect to the status of the national investigations into the alleged involvement of Mr. Ruto.

Requirements of Regulation 62, if applicable, have been met

18. The ICC Appeals Chamber has not yet pronounced on the issue as to whether Regulation 62 of the Regulations of the Court applies to interlocutory appeals; thus the Government should not be penalized for not having filed its Updated Investigations Report under this regulation. Notwithstanding the above, Regulation 62 does contemplate a scenario wherein a participant seeks to present additional evidence before the Appeals Chamber. As the Prosecution notes,<sup>14</sup> the Government has not explicitly followed this provision. Assuming *arguendo* the regulation is applicable, the Defence submits that although the Government did not refer to the regulation itself in the filing of the Updated Investigations Report, it has essentially complied with the regulation’s requirements. That is, that the participant set out the evidence to be presented (the report was attached as an Annex), and that the participant state the ground of appeal that the evidence relates to<sup>15</sup> (the information contradicts the Pre-Trial Chamber’s finding that there was a situation of “inactivity” as regards an investigation), and the reasons it was not adduced before the Trial Chamber (the author of the Updated Investigations Report was only appointed to his position after the date of the decision of the Pre-Trial Chamber<sup>16</sup>). In the event that the

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<sup>14</sup> ICC-01/09-01/11-183, para. 35.

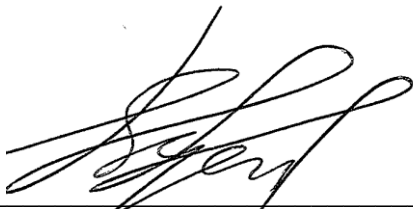
<sup>15</sup> *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-522, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”, 27 May 2008, para. 16.

<sup>16</sup> ICC-01/09-01/11-159, para. 2.

Appeals Chamber finds Regulation 62 applicable,<sup>17</sup> the Defence submits the Appeals Chamber should favour substantial compliance over technical adherence to the regulations. Such an approach is in line with a previous Appeals Chamber decision holding that failure to cite the legal basis for an application to submit additional information to the Appeals Chamber is not fatal to the application.<sup>18</sup>

### III. Conclusion & Relief Sought

19. The Defence submits that the submissions of member States should be treated with respect and presumed to have been made in good faith. The Defence for Mr. Ruto and Mr. Sang respectfully requests the Honourable Appeals Chamber to accept the Updated Investigation Report. Alternatively, the Defence requests the Appeals Chamber to remand the issue back to the Pre-Trial Chamber, with instructions to accept the Updated Investigation Report as well as additional promised reports from the Government of Kenya before making a final determination on the question of admissibility.



Joseph Kipchumba Kigen-Katwa

On behalf of Mr. Joshua Arap Sang and Mr. William Samoei Ruto

Dated this 19<sup>th</sup> of July 2011

In Nairobi, Kenya

<sup>17</sup> The Defence notes that Regulation 62 addresses an issue similar to that dealt with in Rule 115 of the ICTY/R and SCSL Rules of Procedure and Evidence – that of the admission of additional evidence on Appeal. Although Rule 115 refers to appeals from judgments, the jurisprudence of the ICTY has held that it is applicable to interlocutory decisions, such as decisions on provisional release. See, for example, *Prosecutor v. Haradinaj*, Decision On Lahi Brahimagj's Request To Present Additional Evidence Under Rule 115, 3 March 2006, citing *Prosecutor v. Nikola Sainovi c & Dragoljub Ojdanic*, IT-99-37-AR65, Decision on Motion for Modification of Decision on Provisional Release And Motion to Admit Additional Evidence, 12 December 2002; *Prosecutor v. Vidoje Blagojevic et al.*, IT-02-53-AR65, Decision on Motion to Present Additional Evidence, 28 May 2002; *Prosecutor v. Jovica Stanisic and Franko Simatovic*, IT-03-69-AR65.1 and IT-03-69 -AR65.2, Decision on Prosecution's Application Under Rule 115 to Present Additional Evidence in its Appeal Against Provisional Release, 11 November 2004; *Prosecutor v. Vinko Pandurevic and Milorad Trbic*, IT-05-86-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurevic's Application for Provisional Release, 3 October 2005, para. 15.

<sup>18</sup> *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-522, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2008, para. 16.