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

Date: 26 July 2011

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

**Response to 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’”**

Source: Defence for Mr. William Samoei Ruto and Mr. Joshua Arap Sang

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

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Counsel for Joshua Sang

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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**

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

States' Representatives

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REGISTRY

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Ms. Silvana Arbia

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Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction & Procedural History

1. On 31 May 2011, Pre-Trial Chamber II delivered its ‘*Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to the Article 19(2)(b) of the Statute*’ (“Decision”).¹ In this Decision, the Pre-Trial Chamber rejected the Government of the Republic of Kenya’s (“the Government”) challenge to the admissibility of the case that had been filed pursuant to Article 19(2)(b) of the Statute.
2. On 6 June 2011, the Government filed its ‘*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(b)(2) of the Statute”*’.² In its Appeal, the Government submitted that the Pre-Trial Chamber in reaching its Decision erred in procedure, in fact and in law. On 20 June 2011, the Government filed its ‘*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(b)(2) of the Statute”*’.³ The Prosecution submitted its Response to the Appeal on 12 July 2011.⁴
3. On 19 July 2011, the Government sought leave to reply to both the Prosecution’s Response, and essentially also to the parties’ responses to the observations of the OPCV, which are to be submitted to the Appeals Chamber on 26 July 2011.⁵
4. The Appeals Chamber ordered the Prosecutor and the Defence to file any observations as to whether or not the Appeals Chamber should grant or reject the Application to Reply by

¹ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to the Article 19(2)(b) of the Statute, 31 May 2011.

² *Prosecutor v. Ruto et al*, ICC-01/09-01/11-109 OA, 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(b)(2) of the Statute”, 6 June 2011 (“**Notice of Appeal**”).

³ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-135 OA, 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(b)(2) of the Statute”, 20 June 2011 (“**Appeal**”). This filing was subsequently corrected; the Corrigendum was filed as ICC-01/09-01/11-135-Corr (“**Corrigendum**”). A full procedural history is set out in paragraphs 16-41 of the Corrigendum.

⁴ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-183 OA, 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”, 12 July 2011 (“**Response**”).

⁵ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-208 OA, 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’”, 19 July 2011 (“**Application**”).

26 July 2011.⁶ The Prosecution filed its observations on 22 July 2011, objecting to the Government's request for leave to reply, primarily on the basis that Regulation 24(5) is not applicable to appeals brought under Rules 154 or 155.⁷

5. The Defence for Mr. Ruto and Mr. Sang (the "Defence") files its observations herein, supporting the Government's request to reply by 2 August 2011. The Defence submits that such a reply is possible under Regulation 28(2) (as further submissions by the Government are "necessary for the proper disposal of the appeal") or in the interests of justice.

II. Submissions

6. While the Appeals Chamber has ruled that pursuant to Regulation 24(5), an appellant does not have the right to request leave to reply to the other participant's response to the document in support of an appeal brought under Rule 155⁸ (as was the Government's Appeal in this instance), this does not preclude the Appeals Chamber from granting the Government the opportunity to reply.

7. The Appeals Chamber has expressly stated:

"This does not mean that, however, further filings will never be possible in such proceedings; should the arguments that are raised in a response to a document in support of the appeal make further submissions by the appellant necessary for the proper disposal of the appeal, the Appeals Chamber will issue an order to that effect pursuant to regulation 28(2) of the Regulations of the Court, *bearing in mind the principle of equality of arms and the need for expeditious proceedings.*"⁹

8. If granted leave to reply, the Government of Kenya has indicated it will provide the Appeals Chamber with the most up-to-date information on the status of the investigations into the six Suspects, as well as commentary on legal and factual issues arising from the

⁶ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-214 OA, Order on the Filing of Observations in relation to the Application on behalf of the Republic 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'", 21 July 2011 ("**Order**").

⁷ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-217 OA, Prosecution's Response to 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'", 22 July 2011 ("**Prosecution Observations**").

⁸ *Prosecutor v. Lubanga*, ICC-01/04-06-424 OA3, Decision on Application for Leave to Reply, 12 September 2009, paras 5 and 6.

⁹ *Id.*, para. 7 (emphasis added).

Prosecution's Response.¹⁰ Such information is necessary for the proper determination of the appeal, given the Government and the Prosecution's different definitions of what constitutes the time frame for determining admissibility, and what constitutes the definition and evidence of an investigation.

9. The Defence further submits that the notion of equality of arms should extend to the role of a State Party in making arguments regarding issues of sovereignty and complementarity before the Court. The Government of Kenya is advancing the first admissibility challenge by a State Party to the Rome Statute. As such, the Government is charting unknown territory and should be given ample opportunity to present its case and have its position fully heard and considered by the Appeals Chamber. The Defence submits that this merits granting the Government's request for leave to reply. The Defence notes that in similar circumstances, the Appeals Chamber has previously found it in the interests of justice to accept a response which a party was not clearly entitled to submit, where the Chamber was addressing the issue for the first time.¹¹
10. In terms of expeditiousness, allowing the Government to reply will only cost the court one additional week in terms of pleadings. However, if the Government's appeal on admissibility is successful, the proceedings will come to an end. Clearly the time factor weighs in favour of allowing the reply.

III. Conclusion & Request for Relief

11. The Defence supports the Government of Kenya's request for leave to reply and respectfully requests the Appeals Chamber to allow the Government until 2 August 2011 to submit the same.

¹⁰ Application, para. 7.

¹¹ *Prosecutor v. Al Bashir*, ICC-02/05-01/09-51 OA, Reasons For 'Decision on the Application of 20 July 2009 for Participation under Rule 103 of the RPE and on the Application of 24 August 2009 for Leave to Reply', 9 November 2009, para. 8.



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

Dated this 26th day of July 2011

In Nairobi, Kenya