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

Date: 27 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

**Defence Observations on the 'Victims Observations on the
Government of Kenya's Appeal Concerning Admissibility of Proceedings'**

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:

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

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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
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REGISTRY

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Ms. Silvana Arbia

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Deputy Registrar

Mr. Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction & Procedural History

1. On 6 June 2011, the Government of Kenya submitted its '*Appeal against the Pre-Trial Chamber's Admissibility Decision of 30 May 2011*';¹ 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"*'.² In its Appeal, the Government submitted that the Pre-Trial Chamber in reaching its Decision erred in procedure, in fact and in law.
2. On 12 July 2011, the Defence for Mr. Ruto and Mr. Sang (the 'Defence') filed its Response, pursuant to Regulation 64(4) of the Regulations of the Court.³
3. On 19 July 2011, the Office of the Public Counsel for Victims ("OPCV") filed its '*Victims' Observations on the Government of Kenya's Appeal Concerning Admissibility Proceedings*'.⁴ On 26 July 2011, the Government of Kenya filed its Response.⁵
4. The Defence files this Response pursuant to the Order of the Appeals Chamber, issued on 13 June 2011, which allowed the Defence to file a response to the OPCV's observations within seven days of notification of the OPCV's observations.⁶

II. Submissions

ERRORS OF FACT

¹ ICC-01/09-01/11-109 ("**Appeal**").

² ICC-01/09-01/11-135 and ICC-01/09-01/11-135-Corr. A full procedural history is set out in paragraphs 16-41 of the Corrigendum.

³ ICC-01/09-01/11-185, Ruto and Sang Defence Response to the Government 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(b)(2) of the Statute", ("**Response**").

⁴ ICC-01/09-01/11-205 (the 'Victims' Observations).

⁵ ICC-01/09-01/11-226, Response on behalf of the Government of Kenya to the "Victims' Observations on the Government of Kenya's Appeal Concerning Admissibility of Proceedings".

⁶ ICC-01/09-01/11-123, Directions on the submission of observations pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence. See also Regulation 33(1)(d) of the Regulations of the Registry (documents shall be filed with the Registry, at the latest, on the first working day of the Court following expiry of the time limit).

Victims' Observations: Observation III

5. The main contention raised in the Victims' Observations is that "the Chamber's ultimate finding of fact - no investigation had been shown to be ongoing against the defendants in – was correct and reflected a proper exercise of its fact-finding discretion".⁷
6. The Victim's Observations mirrors the submissions made by the Prosecution. As such the Defence relies on its submissions as contained in paragraphs 6-29 of its Response.
7. The Defence notes that in relation to factual findings, the Appeals Chamber has held that they are not reviewable unless they are "patently incorrect".⁸ It is the submission of the Defence that the Victims' Observations have failed to address the central issue of whether the Pre-Trial Chamber was correct when it reached its finding that, on the face of it, "there remains a situation of inactivity"; that is to say that there are no ongoing investigations presently being undertaken into the three suspects.⁹
8. The submissions made in the Victims' Observations that the Government of Kenya "adopted ambiguous and inconsistent positions; and tendered information in an untimely and improper manner" are irrelevant to this central issue.
9. In particular the Defence finds the imputation of intention to both the Pre-Trial Chamber ("This instruction evidently reflected a concern, clearly warranted in light of the leave request, that the Government might attempt to use the reply for an improper purpose"¹⁰) and the Government of Kenya ("The failure to present any information substantiating such an alleged investigation, in context, suggests internal disputes about the scope of investigations, a deliberate attempt to gain a tactical advantage in these proceedings, or, simply, the absence of any such investigations"¹¹) to be not only beside the point but entirely improper in the context of the purpose of the Victims' Observations.
10. The Defence further notes that, as the OPCV agrees, the Pre-Trial Chamber's Decision was not based on the "genuineness" of the national investigation.¹² The imputation of

⁷ Victims' Observations, para. 7.

⁸ ICC-01/04-01/07-572 (*check this cite*)

⁹ ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 31 May 2011, para. 60.

¹⁰ Victims' Observations, para. 21.

¹¹ Victims' Observations, para. 26.

¹² Victims' Observations, para. 42.

mala fides on the part of the Government of Kenya is irrelevant to the present appeal, and it is submitted, unwarranted.

11. It remains the submission of the Defence that the Pre-Trial Chamber, given the information provided to it by the Government of Kenya, was patently in error when it decided that there were no ongoing investigations being undertaken into the three suspects.

PROCEDURAL ERRORS

Victims' Observations: Observation IV

12. The Victims' Observations also adopted all Prosecution submissions in respect of the three procedural errors alleged by the Government, namely (a) the refusal to permit the Government to file further investigation reports within the timetable proposed by the Government; (b) the refusal to hold an oral hearing; and (c) the refusal to decide on the Government's request for assistance.

13. The Defence relies on its submissions as contained in paragraphs 31-51 of its Response.

Victims' Observations: Observation V

14. The Victims' Observations similarly adopted all the submissions of the Prosecution concerning the Chamber's application of the same-person, same-conduct test in defining the term "case" as used in Article 19.

15. The Defence relies on its submissions as contained in paragraphs 52-64 of its Response.

Victims' Observations: Observation VI

16. The OPCV, in its Victims' Observations, also adopted the Prosecution's submissions in relation to the "Updated Investigation Report" filed by the Government of Kenya on 4 July 2011.

17. The Defence notes that following the filing of the Updated Investigation Report by the Government of Kenya, the Appeals Chamber ordered the Defence to file any observations

as to whether the Appeal Chamber should accept or dismiss *in limine*, the Report.¹³ The Defence Observations were filed on 19 July 2011.¹⁴ The Defence relies on its submissions as contained in paragraphs 10-18 of its Defence Observations.

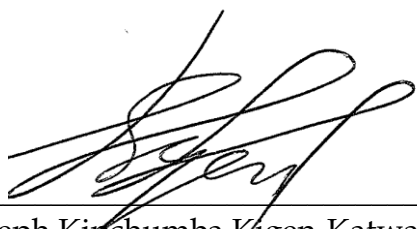
18. Further, the Defence notes that the Order of the Appeals Chamber requiring that observations be filed on whether the Appeals Chamber should accept or dismiss *in limine* was directed to the Defence alone. It reads:

Mr. Ruto, Mr. Kosgey and Mr. Sang, shall file, by 10h00 on Tuesday 19 July 2011, any observations as to whether the Appeals Chamber should accept or should dismiss *in limine* the “Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial’s Decision on Admissibility.

19. As the Appeals Chamber did not indicate that observations from the OPCV were required, the Defence submit that these submissions on this issue as contained in paragraphs 44-50 of the Victims’ Observations should be disregarded by the Appeals Chamber. Had the OPCV wished to file observations on this issue, it ought properly to have applied to the Appeals Chamber to file its observations under the Appeals’ Chamber’s 14 July 2011 Order.

III. Conclusion & Relief Sought

20. The Defence submits that the Pre-Trial Chamber’s decision that the cases against Mr. Ruto and Mr. Sang are admissible is a reversible error based on several errors of fact, procedure, and/or law.



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

Dated this 27th of July 2011
In Nairobi, Kenya

¹³ ICC-01/09-01/11-183, Order on the filing of observations 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”, (the ‘14 July Order’).

¹⁴ ICC-01/09-01/11-200, 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”, (the ‘Defence Observations’).