



Original: English

No.: ICC-01/09-01/11
Date: 11 August 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 Government of Kenya request for an Oral Hearing on Admissibility

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

Counsel for William Ruto

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

Counsel for Henry Kosgey

George Odinga Oraro, Julius Kemboy
and Allan Kosgey

Counsel for Joshua 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

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 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. In so doing, the Pre-Trial Chamber also rejected the Government’s related request for an oral hearing on admissibility.²
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”*’.³ The Appeals Chamber subsequently refused to accept the Government’s filing of an Updated Investigation Report⁴ and denied the Government’s request for leave to reply⁵.
3. On 4 August 2011, pursuant to Rule 156(3), the Government submitted a request for an oral hearing before the Appeals Chamber on the question of the admissibility of the two Kenyan cases before the ICC.⁶ The Appeals Chamber ordered the Prosecutor, the Defence, and the victims to file any observations as to whether or not the Appeals Chamber should grant or reject the Request by 11 August 2011.⁷
4. The Defence for Mr. Ruto and Mr. Sang (the “Defence”) supports the Government of Kenya’s request for the Appeals Chamber to convene an oral hearing. The Defence further

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-01/09-01/11-94, Application for an Oral Hearing Pursuant to Rule 58(2), 17 May 2011.

³ *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**”).

⁴ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-234 OA, Decision on the filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility, 28 July 2011.

⁵ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-239 OA, Decision on 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’”, 1 August 2011.

⁶ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-246 OA, Request for an Oral Hearing Pursuant to Rule 156(3), 4 August 2011 (“**Request**”).

⁷ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-248 OA, Order on the filing of a response to the Republic of Kenya’s “Request for an Oral Hearing Pursuant to Rule 156(3), 5 August 2011 (“**Order**”).

requests that if such a hearing is convened, the Defence for Mr. Ruto and Mr. Sang should be given an opportunity to make oral submissions.

II. Submissions

5. There is precedent at the ICC for hearing oral submissions from a state party on the question of admissibility. In the *Katanga* case, the Trial Chamber ordered an oral hearing specifically so that it could hear directly from the Government of the Democratic Republic of the Congo regarding the question of admissibility.⁸ When the Congolese authorities indicated they could not appear on the date set for the hearing, the Chamber postponed the hearing because it considered the presence of the Congolese authorities to be “indispensable”.⁹ At the hearing, the Government of the DRC, the Prosecutor, the Defence teams and the victims were all given the opportunity to make submissions. Those representing the Government of the DRC included the Minister of Justice, the General Prosecutor, the Advocate General at the Supreme Military Court, and an advisor from the Ministry of Justice.¹⁰ While the Defence appreciates that in the *Katanga* case, the Government was heard by the Trial Chamber and not the Appeals Chamber, the Defence submits that this same level of courtesy and deference should be afforded to the participation of the Government of Kenya in this case.
6. The Defence recalls that there are several novel and complex legal and factual issues that are at issue in the appeal, namely: what constitutes a national investigation, the level of evidence required to establish that an investigation is ongoing, the procedure under Rule 58 for admissibility challenges, the definition of a “case” in Articles 17 and 19, and the applicability of the “same person, same conduct” test. Given these issues, an oral hearing would not be a frivolous exercise, but would allow the Appeals Chamber to carefully probe the nuances of each argument before reaching a decision that will set precedent for future admissibility challenges. The Defence submits that this is especially crucial when such issues touch on State sovereignty and national interest.
7. The Defence supports the submissions of the Government at paragraph 14 of its Request to the effect that an oral hearing will not delay the consideration of the appeal in

⁸ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1112tENG, Order to Convene Hearing (rule 58(2) of the Rules of Procedure and Evidence), 7 May 2009.

⁹ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1140 tENG, Order Postponing the Hearing Relating to the Challenge to Admissibility (Rule 58(2) of the Rules of Procedure and Evidence), 15 May 2009, para. 4.

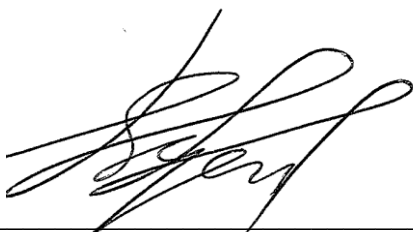
¹⁰ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-65-ENG, Transcript, 1 June 2009.

contravention of Rule 156(4). The Government of Kenya is obviously prepared to make oral submissions and could likely do so in a timely manner.

8. The Rules do not specify the time or stage at which a State or a party should make a request for an oral hearing under Rule 156(3). Therefore this should not serve as an impediment to the Government's current request. This is especially true when, as here, the Government of Kenya is advancing the first admissibility challenge brought by a State Party to the Rome Statute. As such, the Government should be given ample opportunity to present its case and to have its position fully heard and questioned before final consideration by the Appeals Chamber. State parties should be accorded the respect they are entitled to on critical issues of national interest; the Kenyan public should not perceive that the ICC is not taking its representations seriously.

III. Conclusion & Request for Relief

9. The Defence supports the Government of Kenya's request for an oral hearing and requests that if such is granted, the Defence be given the opportunity to make oral submissions on its own behalf.



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

Dated this 11th day of August 2011

In Nairobi, Kenya