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No: ICC-01/09-02/11 OA

Date: 11 August 2011

IN THE APPEALS CHAMBER

Before: Judge David Daniel 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. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI
KENYATTA AND MOHAMMED HUSSEIN ALI

PUBLIC

Defence Response to the “Request for an Oral Hearing Pursuant to Rule 156 (3)”

Source: Defence of General Mohammed Hussein Ali

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

The Office of the Prosecutor

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Detention Section

Victims Participation and Reparations

Other

Introduction

1. On 3 August 2011, the Government of the Republic of Kenya ("GoK") submitted the "Request for an Oral Hearing Pursuant to Rule 156 (3)", (the "GoK Request").
2. On 5 August 2011, the Appeals Chamber (the "Chamber") issued "Order on the filing of a response to the Republic of Kenya's "Request for an Oral Hearing Pursuant to Rule 156 (3)"".
3. The Defence of Mohammed Hussein Ali submits the following observations in support of the GoK request.

Submissions

4. The Defence notes that Rule 156 (3) requires proceedings to be in writing unless the Chamber orders otherwise. The Defence submits that while it is for the Chamber to decide if a party has advanced reasons for departing from the rule that "proceedings shall be in writing", such a determination should uphold the right to a fair trial. The Defence urges this Court to be guided by the jurisprudence of the European Court of Human Rights that has held that the entitlement to a 'fair and public hearing' in art 6(1) necessarily implies a right to an 'oral hearing'.¹
5. The Defence is alive to the fact that the right to an oral hearing is in no way absolute and must be subject to the need to ensure fair and expeditious proceedings.² As far as fairness is concerned, the issue at hand is the determination of the appeal on the decision on the admissibility challenge by the Government of Kenya. Although a party entirely independent of the Accused, the matters raised in the appeal would have a significant bearing on the determination of the case against the accused.

¹ See *Oganova v Georgia* [2007] ECHR 25717/03 (13 November 2007) para 27

² Indeed this is consistent with Rule 156(4) and also jurisprudence of this Chamber in *Prosecutor v. Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", ICC-01/04-01/06-2582, 8 October 2010, para. 27.

6. On expeditiousness, the Defence notes that the GoK appeal involves a number of novel and complex issues that are core to the principle of Complementarity that need to be resolved. As noted by Pre Trial Chamber III in *Bemba* an oral hearing “enabled [the court] to address what is a relatively complicated issue extremely expeditiously and helpfully.”³ The Defence submits that the issues to be decided in the appeal raise questions of law and fact, which cannot be adequately resolved based on the written submissions. Thus if the Chamber were minded to grant an oral hearing, the same will not affect the expeditiousness of the proceedings.
7. The Defence also associates itself with the submissions of the GoK in regard to the “public interest” in the determination of the issues. The issue of admissibility of the case before the Court raises issues that are of utmost importance to the Kenyan public and the international community at large. Indeed, the need for publicising hearings has been highlighted by the United Nations Human Rights Committee in its General Comment No. 32 on Article 14 as follows:

The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing.⁴ (Emphasis added)

8. Finally, it is the first time a state has raised an admissibility challenge before the Court and therefore there is need to ensure the public witnesses the conduct of these proceedings in the most transparent way, through an oral hearing.

³ *Prosecutor v. Jean Pierre Bemba Gombo*, Status Conference Hearing, ICC-01/05-01/08, 27 April 2010, pg. 69

⁴ ‘General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial,’ UN Doc. CCPR/C/GC/32, para. 32.

Conclusion

9. For the foregoing reasons, the Defence requests the Chamber to allow the GoK's Request for an oral hearing.

Respectfully submitted,



Evans Monari and Gershom Otachi Bw'omanwa
On behalf of Mohammed Hussein Ali

Dated this 11th day of August 2011

At Nairobi, Kenya