Cour
Pénale
Internationale

International
Criminal
Court

Original: **English** No.**: ICC-01/09-01/11**

Date: **6 June 2011**

THE APPEALS CHAMBER

Before: **Judge Daniel David Ntanda Nsereko**
Judge Akua Kuenyehia
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
PROSECUTOR v. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY, and JOSHUA ARAP SANG

Public Document

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: **The Government of the Republic of Kenya, represented by Sir Geoffrey Nice QC and Rodney Dixon**

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, Kioki Kilukumi Musau, and David Hooper QC

Counsel for Henry Kiprono Kosgey
George Odinga Oraro

Counsel for Joshua Arap Sang
Joseph Kipchumba Kigen-Katwa

Legal Representatives of Victims

Legal Representatives of the Applicant

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Paolina Massida

The Office of Public Counsel for the Defence

States Representatives
Sir Geoffrey Nice QC
Rodney Dixon

Amicus Curiae

REGISTRY

Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section
Fiona McKay

Other

A. Introduction

1. The Government of Kenya respectfully submits its appeal against Pre-Trial Chamber II's "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" dated 30 May 2011 before the Appeals Chamber pursuant to Article 82(1)(a) of the Statute (the "Admissibility Decision").[1]

2. The Government of Kenya submits that the Pre-Trial Chamber erred in procedure, in its factual findings and in law in its decision that the case(s) are admissible before the ICC.

3. As part of its factual findings the Pre-Trial Chamber found, or seemed to find, that the Government of Kenya was vulnerable to conclusions - adverse in effect to its Application - about the Government of Kenya's good faith generally and about its intentions concerning the prosecution and trial of the six Suspects in particular. By making implications, even by allowing inferences, of this kind unsupported by evidence the Pre-Trial Chamber has, in reality, subjected the Government of Kenya to an adverse presumption. Adverse presumptions are, of course, banished from consideration when dealing with individual Suspects. They are equally wrong when doing justice *vis-a-vis* a State Party to the Rome Statute. Nothing in the jurisprudence of the ICC allows for such presumptions.

The law on appeals against decisions in respect of admissibility

4. The Government of Kenya files this appeal pursuant to Article 82(1)(a) and in accordance with Rule 154(1). The Government of Kenya will file a document in support of its appeal under Regulation 64(2).[2]

---

[1] *Prosecutor v. Ruto* et al., Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-101, 6 June 2011 (hereinafter "Admissibility Decision").

[2] The Appeals Chamber has held that appeals under Article 82(1)(a) can be based on erros of laws, errors of fact and procedural errors. See *Prosecutor v. Kony,* Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05, 16 September 2009, para. 47.; *Prosecutor v. Bemba,* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08, 19 October 2010, para. 100-101. The Appeals Chamber has held that "for a successful appeal, the error raised by an appellant must have materially affected the impugned decision ... the Appeals Chamber stated that an error materially affected the impugned decision if the decision would have

5. Article 82(1)(a) of the Statute allows parties to appeal "A decision with repect to jurisdiction or admissibility." Such appeals can be based on errors of law, errors of fact and procedural irregularities.

6. Rule 154(1) states that "An appeal may be filed under ... article 82, paragraph 1 (a) or (b), not later than five days from the date upon which the party filing the appeal is notified of the decision."[3]

7. Regulation 64(2) provides that "the appellant shall file a document in support of the appeal, with reference to the appeal, within the 21 days of notification of the relevant decision."[4]

Procedural History

8. On 31 March 2011, the Government of Kenya filed the "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute" requesting Pre-Trial Chamber II determine the case against the six persons for whom summonses to appear have been issued, is inadmissible ("the Admissibility Application"). Within the Admissibility Application, the Government of Kenya asked for an oral hearing "to permit the Government the opportunity to address the Pre-Trial Chamber in respect of its Application … so that all relevant arguments can be submitted and considered"[5] and additionally for a status conference "to discuss the timetable as set out in the Application and for submissions from the parties to be made on procedure."[6]

---

been "substantially different'." *Prosecutor v. Katanga,* 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, ICC-01/04-01/07, 25 September 2009, para. 37.

[3] The Government was notifed of the Admissibility Decision on 30 May 2011. According to Regulation 33(1) of the Court, "[w]hen the last day of a time period falls upon a Saturday, a Sunday or an official holiday of the Court, the next working day of the Court shall be considered the last day". Therefore, because Reg. 33(2) does not take the day of notification into consideration for the calculation of the time period, the Government must file this appeal by 6 June 2011.

[4] The Government of Kenya was notified of the Admissibility Decision on 30 May 2011. In accordance with Regulation 64 of the Court and Regulation 33, the Government must file the document in support of this appeal no later than 20 June 2011.

[5] Admissibility Application of 31 March 2011, para. 20.

[6] Admissibility Application of 31 March 2011, para. 21.

9. On 4 April 2011, Pre-Trial Chamber II issued the "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute", in which Pre-Trial Chamber II invited the Prosecution, the Defence and the OPCV to submit written observations in respect of the Admissibility Application by 28 April 2011. In this Decision, Pre-Trial Chamber II also rejected the Government of Kenya's request to "convene a status conference to organize the proceedings related to the challenge under article 19(2)."[7]

10. On 11 April 2011, the Government of Kenya filed a request for 30 days to run from the deadline when the parties' Responses must be received in which to reply [until 30 May 2011].

11. On 21 April 2011, the Government of Kenya filed the "Filing of Annexes of Materials to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute," as well as, the "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194." In the Request for Assistance, the Government of Kenya requested "the Court and the Prosecutor provide to the appropriate Kenyan authorities the evidence in the possession of the Court and the Prosecutor to assist the Kenyan authorities in their national investigations and prosecutions."[8]

12. On 21 April 2011, the Prosecutor filed the "Prosecution's response to the Government of Kenya's request to reply," in which the Prosecution supported the Government of Kenya's request to reply as far as it does not exceed "the 10 day time limit proscribed in Regulation 34(c)" of the Regulations of the Court.

13. On 28 April 2011, the Chamber received responses to the Government's Admissibility Application from the parties, namely: Mohammed Hussein Ali, Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Henry Kiprono Kosgey, William Samoei Ruto and Mr. Joshua Arap Sang, the Prosecutor, and the OPCV.

14. On 2 May 2011, the Government of Kenya submitted its "Application on behalf of the Government of Kenya for leave to reply to responses filed by the parties on 28 April 2011 in light of the responses being filed and of no decision being rendered in respect

[7] Decision of 4 April 2011, para. 5, 9.
[8] Government Request for Assistance of 21 April 2011, para. 3.

of the Government's filing of 11 April 2011 requesting a direction on its right to reply."

15. On 2 May 2011, Pre-Trial Chamber II granted the Government of Kenya's Application for leave to reply to the parties Responses of 28 April 2011 within 10 days.

16. On 10 May 2011, the Prosecution filed the "Prosecution's Response to 'Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194'" with a corrigendum to this Response received on 12 May 2011. The Response invited the Chamber to reject the Government of Kenya's Request for Assistance on various grounds based largely on very serious, as yet unsupported, allegations about the Government of Kenya's inability to protect victims and witnesses, which go so far as to claim (without any evidence) that the Government of Kenya could be involved in witness intimidation.

17. On 13 May 2011, the Government of Kenya submitted its Reply to the Responses of the parties filed of 28 April 2011 to the Government's Admissibility Application. The Government of Kenya stated in its Reply that the six suspect were, and are, being investigated by the Kenyan authorities.

18. On 17 May 2011, the Government of Kenya submitted its Application for an oral hearing, in which the Government of Kenya requested the Chamber grant the Government of Kenya and other parties an oral hearing to make submissions to the Court on legal issues and on the evidence of its national investigation in Kenya, as the Chamber had not ruled on the Government of Kenya's request for an oral hearing expressed in its original 31 March 2011 Admissibility Application.

19. On 18 May 2011 the Government of Kenya submitted an application for leave to reply to the Prosecution's Response of 10 May 2011 in respect of the Government's Request for Assistance. On 31 May 2011 the Government of Kenya filed a request for this decision to be issued before any decision was made on the merits of the Government's Request for Assistance. No decision has yet been issued.

Grounds of Appeal

20. The Government of Kenya's appeal is based on errors in procedure, in fact and in law.

Procedural errors

21. It was a serious error of the Pre-Trial Chamber not to allow the Government of Kenya, and other parties, a Status Conference that could permit all parties, including the Government of Kenya, to make oral public representations about the procedure that it would have been appropriate to follow in this, the ICC's first full Admissibility Application of this type, and not to decide, *in principle*, thereafter to hold an Oral Hearing on the merits.

22. The Pre-Trial Chamber's analysis of its understanding that by refusing an application for a "Status Conference" it was dealing with, and declining, the Government of Kenya an "Oral Hearing" may reflect an unfortunate *mis*understanding as between the Government of Kenya and the Chamber.[9] There was no uncertainty in the minds of the Government of Kenya or of its counsel that in seeking a Status Conference to decide on procedure it was seeking a hearing where *future* conduct of the Application - i.e. conduct *following* such a Status Conference itself - could be considered. There was no uncertainty on the part of the Government of Kenya that at such a Status Conference the Government of Kenya would have asked the Chamber to determine that an oral hearing would have been, *in principle*, appropriate once all filings had been made by all parties and the issues between the Government of Kenya, the Prosecutor, the Victims' representatives and the representatives of the six Suspects had been identified. Status conferences - however "titled" but in all areas of the law in most or all developed legal systems - are commonplace as a necessary mechanism whereby trials can be properly planned and regulated. They are, and by their title are *obviously*, different in purpose and form from substantive oral hearings.

23. The Government of Kenya says that an oral hearing would, 'in principle' have been appropriate in this case (and obviously so) because it was inevitable that there would be different approaches to the issue of admissibility by the different parties and inconceivable that all factual, or even all legal issues, could be resolved simply through an exchange of written filings. There were likely to be factual disputes that

[9] Admissibility Decision, paras. 36-42.

might only be resolved by attending to, *and weighing*, oral evidence - as has turned out to be the case. Inevitably issues of law on how the test of admissibility should be explored and determined would arise that would *justify* - and in reality *demand* - the advantage of a full public oral hearing and discussion on the law by the Pre-Trial Chamber, unless the Pre-Trial Chamber regarded the Appeals Chamber as the only place where the law on this seminal topic might be correctly determined. However, even to contemplate the resolution of difficult issues *only* by the Appeals Chamber is to overlook the great advantage of having difficult points discussed publicly at different levels of a 'layered' judiciary, by which processes the correct law is more likely finally to be identified. To abandon the chance of a first public discussion to the only discussion - in public or on paper - of a *final* appeal court is to lose the great advantage for the development of the law that public discussion can bring (in which for example judges can test any provisional views of their own through exchange with counsel).

24. The Government of Kenya *can* understand how it is now said by the Chamber that the word 'Accordingly' at the start of paragraph 21 of the Application may have allowed the Chamber to conceive of an identity of concept in the terms "oral hearing" and "status conference".[10] But the Government of Kenya says, in its own interest, that such an interpretation should have been corrected in the Chamber's understanding by consideration of the way the word "oral" was used in paragraph 20 of the Admissibility Application. Further (in light of the very obvious function of status conferences generally as set out above) it is hard to see how a Pre-Trial Chamber in such an important application could rule *against* an "oral hearing" ahead of all relevant filings by other parties, and a potential reply by the Government of Kenya. Indeed it was not until a second filing by the Government of Kenya (its Reply) that the need for evidence from the Commissioner of Police was identified in a developing case where, for good reasons, all 'i's could not be dotted and all 't's could not be crossed at the first application.

25. The suggestion that the Government of Kenya or its lawyers intended the references to "oral hearing" to refer to "status conference" and have in some way misrepresented

---

[10] It would not appear to have been a misconception of the Government's position experienced by other counsel in the case who made filings about an oral hearing. See *Prosecutor v. Ruto* et al., Response on behalf of Mr. William Samoei Ruto and Mr. Joshua Arap Sang to the 'Application for an Oral Hearing Pursuant to Rule 58(2)', ICC-01/09-01/11, 20 May 2011.; *Prosecutor v. Ruto* et al., Response on behalf of Henry Kiprono Kosgey to the 'Application for an Oral Hearing Pursuant to Rule 58(2)', ICC-01/09-01/11, 25 May 2011.

the position is simply wrong. The Government of Kenya is, of course, prepared to accept that the Chamber misunderstood what the Government of Kenya says was obvious. The Government of Kenya somewhat diffidently observes that correcting such a misunderstanding is one of the things that can be achieved in status conferences.

26. The refusal by the Pre-Trial Chamber to hold a status conference in which the need for an oral hearing could have been established and in due course to hold such an oral hearing has had serious consequences affecting the validity and integrity of the determination made about admissibility. Evidence that would have been available to the Pre-Trial Chamber has not been heard. For example (and only by way of example), oral evidence of the Commissioner of Police would have provided concrete details of the investigation into the six Suspects and would have explained the history to date in a way that would not have justified jurisdiction of Kenya being lost to the ICC for these cases. Yet it was for a purported lack of *these very details* that the Chamber rejected the Government's Admissibility Application.[11] A great deal of other evidence could, and would, have been available to the Pre-Trial Chamber but cannot now be considered unless the present decision is reversed and the Appeals Chamber decides to remit the case for further hearings by the Pre-Trial Chamber (see below for proposed alternative resolutions of this appeal).

27. Separately, the fact that the Chamber had not determined the Government's Request for Assistance of 21 April 2011 (in which the Government of Kenya requested to have access to the evidence relied on by the Prosecutor in respect of the six Suspects subject to appropriate measures of witness protection) before it rendered its decision on the Admissibility Application, or even allowed the Government of Kenya a right to reply to the Prosecutor's Response refusing to assist the Government of Kenya, has resulted in the Government of Kenya being without evidence that might be of great importance to its investigations. The Government of Kenya is thus less able - through no fault of its own - to support its admissibility arguments. It has left the Pre-Trial Chamber free to speculate - or to infer - that the Government of Kenya would not have done what it should have done if it had received the Prosecutor's evidence. The Government of

[11] Admissibility Decision, paras. 60, 64, 65, 68, 69, 70.

Kenya may, in fact, never have been aware of such evidence and may never have had possession.[12]

28. These procedural errors, the Government of Kenya will say, deprived it of the opportunity to present critical evidence and arguments (as to the legal arguments that would have been explored, see below) as a result of which its Admissibility Application has been determined without regard to the rule of law/due process by a Pre-Trial Chamber that appeared willing to *presume* that the Government of Kenya had failed to meet its obligations.

Errors of fact

29. Consideration of the errors of fact complained of as well as errors of law may benefit from the proposition that there is a 'universe' of evidence about the Post-Election Violence in Kenya *but* that only part of that 'universe' may be available to Kenya and only part - almost certainly a *different* part - available to the Prosecutor of the ICC. The impact of this on the grounds of appeal *in law* is dealt with below. As to the appeal on grounds of errors of fact, the Government of Kenya will argue, *inter alia,* that assessing what is or is not established by evidence *has* in fairness to be done with recognition of these two parts of the universe being non-congruent. The Appeals Chamber is respectfully reminded of the procedural argument at paragraph 28 above and of the fact that provision by the Prosecutor of evidence in his possession and cooperation by the Government of Kenya in provision of its evidence to him (something that was always available to the Prosecutor had he asked) would have achieved congruence, or a state nearer to congruence. This would have rendered it easier for an assessment to be made on paper of what the evidence in fact available to the Government of Kenya for its investigations actually allows for factual findings about complementarity.

30. Fundamental errors of fact in the Pre-Trial Chamber's Admissibility Decision include those resulting from:

- The Chamber merging the 'Parliament of Kenya' with the 'Government of Kenya', especially unfortunate since the Government - who bring the

[12] Admissibility Decision, para. 60.

Admissibility Application - has been consistent in its support for the ICC and it has been the Parliament that attempted to withdraw Kenya from the Treaty of Rome by which the Court was established. The statutory reforms in Kenya, as the filings reveal, have been introduced by the *Government* of Kenya.

- The Chamber overlooking the information supplied by the Government about the nature of the investigation into the six Suspects. The Government of Kenya specifically stated that witnesses were being interviewed, video material was being surveyed, all reports were being reviewed for relevant evidence, and various other concrete steps were being taken under the direction of the Commissioner of Police (see, for example, para. 56 of the Government's Reply).

- The Chamber erring in finding that at the time of the Attorney's General's letter of 14 April 2011 to the Commissioner of Police no investigation into the six Suspects was underway. As explained in the filings, the national investigation covered all allegations against all persons. A 'bottom up' approach was followed i.e. gathering evidence about the direct perpetrators leading up to those who may have been in charge. The report of the Director of Criminal Investigation of 5 May 2011 makes plain that all six Suspects were specifically investigated after being named by the ICC Prosecutor.[13]

31. These are all matters that should have been explored in an oral hearing with the Commissioner of Police giving evidence. He would have provided any necessary details.

32. The Chamber further erred in finding that a report on the investigation could have been given earlier by the Government of Kenya.[14] The Chamber provided no reason at all why such a report could not have been submitted by the Government of Kenya to the Chamber at the end of July 2011 for its consideration.

[13] Government Reply of 13 May 2011, Annex 2.
[14] Admissibility Decision, para. 63.

33. Moreover, the Chamber erred in finding that specific details of the investigation are required to establish the existence of an investigation[15] when it was clear on the evidence that an investigation into the six Suspects had been underway for some time.

34. The Appeals Chamber is encouraged to read the Reply of the Government of Kenya dated 13 May 2011 beside the Chamber's Decision on Admissibility, the subject of this appeal, and to reconcile the evidential matters relied on by the Government of Kenya against the way they were dismissed by the Chamber. The Government of Kenya will assert in this appeal that, in light of the respect to which assertions of Governments are entitled and that have *not* been countered by evidence of the Prosecution or other parties and that have *not* been found on the basis of any evidence to be false by the Chamber, the decision of the Chamber should be reversed and, subject to alternative resolutions discussed below, the admissibility of the two cases should be denied.

Errors of law

35. The Pre-Trial Chamber allowed itself - not least by refusing itself the advantages of an oral hearing - to make errors of law and of basic conception in deciding that investigations by Kenya had to be of the six Suspects if the Government of Kenya was to have any prospect of succeeding in its admissibility challenge.[16]

36. The Government of Kenya stands by all its assertions in its Application and Reply that, *as a matter of law*, the Government of Kenya cannot be expected to investigate those against whom it may have no evidence, especially when the Prosecutor, who has evidence it appears, has declined to make his evidence available to the Government of Kenya.

37. The arguments at paragraphs 26, 27 and 28 of the Government's Reply which explain how the position taken by the Prosecutor and the Chamber is logically untenable have not been dealt with at all by the Pre-Trial Chamber. In the simplest terms the Pre-Trial Chamber seeks to put the cart of its conclusion before the horse of logic for no good reason.

[15] Admissibility Decision, paras. 60, 64, 65, 68, 69, 70.
[16] Admissibility Decision, paras. 52-60.

38. In the setting of the Government's Application, it is appropriate to start with the assumption that a State Party that asserts it is aware of its duties and is complying with them *need not* be in possession of evidence against the Suspects identified, or chosen, by the Prosecutor. Once the Prosecutor in the present case named the six Suspects, the Government of Kenya directed that those six should be a specifc focus of the national investigation. They had up to that point not been excluded from the national investigation into all allegations against all persons, and were thereafter specifically included. Having been refused access to the Prosecutor's evidence the Government of Kenya sought assistance from the Chamber but has, thus far, not been accorded any assistance by either the Prosecutor or the Chamber.

39. The Government of Kenya submits further that the Chamber has erred in its findings that suggest that the Government of Kenya has not been anything other than straightforward and open with the Chamber about its intentions and the nature of its investigation including into the six Suspects. The Government of Kenya has in mind in particular the following paragraphs of the Decision:

- Paragraph 25: "remains unconvinced …"
- Paragraph 26: the implication that there was some calculation in the Government not presenting the Admissibility Application and the Request for Assistance together
- Paragraph 37: "good faith …"
- Paragraph 40: "misleading …"
- Paragraph 41: "should have requested …"
- Paragraph 53: "either misunderstood or disagreed …"
- Paragraph 54: "misleading …"
- Footnote 96: "presented new arguments …"
- Paragraph 60: "cast doubts on the will of the State…"

40. None of these paragraphs and no other part of the Decision deal with the fact that the Government of Kenya may well *not* have had evidence and willing it to have been so may not be sufficient. The Chamber also fails completely to deal with the open way the Government of Kenya has explained the difficult history, the developing approach

of different parties to the continuing investigation (mistrust of the police etc) and the process of reform, continuing day by day.

41. The Decision of the Chamber cannot obscure the fact that the meaning of "case" in Articles 17 and 19 as used for purposes of testing complementarity compliance is unresolved by the Appeals Chamber and that the arguments raised by the Government of Kenya are arguments it appears it was impossible to meet.

42. The definition of "case" has not been determined by the Appeals Chamber and needs to be after full and open argument, which the Government of Kenya will more fully address in its document in support of this appeal and therefore, if so ordered at an oral hearing.

43. The Chamber erred in questioning the determination of Kenya to investigate the six Suspects purely on the basis of the Government of Kenya's legal submissions about the application of the principle of complementarity. The fact is that, on the basis of the evidence produced, an investigation into the six Suspects is underway and the requirements that 'complementarity' makes of Kenya for it to retain jurisdiction in this case are satisfied.

Relief sought

44. The Government of Kenya will respectfully invite the Appeals Chamber to overturn and reverse the Pre-Trial Chamber's decision and hold the two cases not to be admissible before the ICC. Alternatively, and depending on the Appeals Chamber's own view of the evidence already presented and to be available by the time of any final hearing or determination by the Appeals Chamber of this appeal, the Appeals Chamber could return the matter to the existing - or a reconstituted - Pre-Trial Chamber to hear and assess evidence on issues of complementarity together with argument from all parties.

____

Sir Geoffrey Nice QC

Rodney Dixon

Counsel on behalf of the Government of the Republic of Kenya

Dated 6th June 2011

London, United Kingdom