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No.: **ICC-01/09-01/11**
Date: **28 April 2011**

PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**
Judge Hans-Peter Kaul, Judge
Judge Cuno Tarfusser, Judge

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 on behalf of Mr. William Samoei Ruto and Mr. Joshua Arap Sang to the 'Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute'

Source: **Defence**

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

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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

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REGISTRY

Registrar
Ms. Silvana Arbia, Registrar

Counsel Support Section

Deputy Registrar
Mr. Didier Daniel Preira, Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. Procedural History

1. On 31 March 2011, the Government of the Republic of Kenya (the Government) filed a challenge to the admissibility of the case pursuant to article 19(2)(b) of the Statute (the Challenge), on the grounds that the Kenyan authorities have initiated investigations into the case against the Defendants.
2. In its Challenge, the Government informed the Pre-Trial Chamber that:
    i. The Government has adopted a new Constitution and other legislative reforms, which enhance the ability of national authorities to conduct independent, fair, effective, and impartial proceedings;[1]
    ii. The Government has adopted the International Crimes Act 2008, which internalises the Rome Statute,[2] and the Constitution specifies that there is no immunity for any person by virtue of their position;[3]
    iii. The Government has adopted a Witness Protection Amendment Act of 2010, which addresses the concerns of the Waki Commission;[4]
    iv. The Government wishes to investigate and prosecute all cases arising out of the electoral violence to ensure an holistic approach, which eliminates any accountability gaps;[5]
    v. The scope of the investigations encompasses both the same incidents, which comprise the 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang',[6] the same persons, who are the subject of this Decision, and the underlying conduct, which has been attributed to the Defendants;[7]
    vi. The Kenyan authorities will use the evidential findings of national and international bodies as the foundation for their own investigations;[8]
    vii. The Kenyan authorities will also utilise the evidence and findings from prosecutions against lower level perpetrators to assist them to build

[1] At paras 2 and 5.
[2] At para 23.
[3] At para 59.
[4] At pata 78.
[5] At para 11.
[6] ICC-01/09-01/11-01.
[7] "The Government accepts that national investigations must, therefore, cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC. The Kenyan national investigative processes do extend to the highest levels for all possible crimes, thus covering the present cases before the ICC". At para 32.
[8] At para 70.

their cases against the persons from the ODM and PNU who are the most responsible for these events;[9] and

viii. The Government has at all times asserted its sovereign right to try these cases.[10]

3. On 4 April 2011, the Pre-Trial Chamber issued its 'Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute',[11] in which the Pre-Trial Chamber ordered the parties to file their response by 28 April 2011.
4. The Defence of Mr. Ruto and Mr. Sanga respectfully informs the Honourable Pre-Trial Chamber that it does not oppose the Challenge. At the same time, the Defence would like to confirm that in so doing, the Defence is not joining the Challenge of the Government of the Republic of Kenya, but is preserving its right to file submissions on admissibility in an independent manner, should the present Challenge be rejected.

2. Submissions

Kenya is currently investigating the case against the Defendants

5. Article 17(1)(a) of the Statute provides that the Court shall determine that a case is inadmissible where the "case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is willing or unable genuinely to carry out the investigation or prosecution".
6. When read together with article 17(1)(b) – which refers to inadmissibility due to a decision of national authorities not to prosecute the defendant – it is clear that the term 'investigated' in article 17(1)(a) refers to the early stages of an investigation, which precede a decision whether to prosecute a particular person.
7. Trial Chamber II has also confirmed that the definition of a case for the purpose of determining admissibility prior to the confirmation hearing, is necessarily broader than the type of proceedings, which would trigger the application of the article 20 *ne bis in idem* principle after the confirmation hearing.[12] Article 20 provides that the *ne bis in*

[9] At para 34.
[10] At para 42.
[11] ICC-01/09-01/11-31.
[12] "These observations all highlight that, after the confirmation of charges, only challenges based on article 17(1)(c) of the Statute are allowed. The possibility of only bringing challenges based on the alleged violation of the *ne bis in idem* principle at this stage of the proceedings is explained by the fact that it is only when the charges are confirmed that it is possible to determine whether the case falls within the scope of article 20 of the Statute. Any other challenge from the protection of the sovereign right of States to investigate and prosecute in

idem principle will be triggered by any proceedings which related to the "conduct which formed the basis of crimes", for which the person has been convicted or acquitted by another Court. It therefore follows that the definition of a case for the purposes of a challenge to admissibility under article 17(1)(a) is broader than the same person/same conduct test, which applies to *ne bis in idem* proceedings.

8. Indeed, it would be highly artificial and inconsistent with the Statutory provisions, which govern the confirmation phase to require an exact correlation between national proceedings and ICC proceedings. For example, article 19(5) of the Statute requires a State to file a challenge to admissibility at the earliest opportunity. However, the Prosecution is not required to file its charges until thirty days before the confirmation hearing,[13] and can amend the charges up until fifteen days before the hearing.[14] Moreover, as confirmed by this Pre-Trial Chamber in the Kenyatta et al case, the charging document does not need to conform to the Pre-Trial Chamber's findings concerning the alleged crimes, which were set out in the Decision on the application for the summonses.[15]
9. The Pre-Trial Chamber may also decline to confirm certain charges,[16] or adjourn the hearing and request the Prosecution to amend the charge because the evidence appears to support a different crime within the jurisdiction of the Court.[17] For example, in the Bemba case, the Pre-Trial Chamber adjourned the confirmation hearing and requested the Prosecution to consider amending the charges to reflect Mr. Bemba's responsibility as a commander under article 28 rather than a co-perpetrator pursuant to article 25(3)(a) of the Statute.
10. It is therefore highly possible that if the charges are eventually confirmed, then they may be confirmed in a significantly altered manner from the version, which either the Prosecution referred to in its initial request for summonses, or, for which the Pre-Trial Chamber found that the reasonable grounds threshold had been met in connection with the issuance of the summonses.

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cases of crimes committed by their nationals or in their territory, or from the sufficient gravity of the case, must be made before the confirmation of the charges", Prosecutor v. Katanga and Ngudjolo, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213, 16 June 2009, at para 47.

[13] Rule 121(3) of the Rules of Procedure and Evidence.

[14] Rule 121(4) of the Rules of Procedure and Evidence.

[15] Prosecutor v. Kenyatta et al, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali'", ICC-01/09-02/11-27, 1 April 2011, at paras 24 and 31.

[16] Article 61(7)(b) of the Statute.

[17] Article 67(1)(c) of the Statute.

11. If the Chamber were to adopt too narrow a definition of a case, the Prosecution could defeat successive challenges to admissibility by merely altering the parameters of its case throughout the pre-confirmation process. For example, even if there was an exact correlation between the scope of national investigations and the scope of the charges at the time of the issuance of the summonses, the Prosecution could file a charging document with additional crime bases (which may be unlikely to be confirmed), for the purpose of rendering the case admissible before the ICC at the time that admissibility is determined by the Chamber.
12. Such a possibility is at odds with the overarching premise of complementarity that the ICC should be a Court of last resort, and the fact that a State or the Defence may only challenge admissibility once, as of right.
13. In any case, as noted above, the Government has confirmed that the national authorities are investigating persons at the highest levels – which includes the Defendants – in connection with the same conduct and incidents, which formed the basis for the 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang'. The practice of the ICC thus far has been to accept the information provided by national authorities concerning the status of national investigations, unless there is compelling evidence to the contrary.[18]
14. Since the Prosecution has not commenced its disclosure of the evidence to the Defence, the Defence is not in a position to verify the extent of the evidential overlap between the investigations conducted by the ICC Prosecution, and those conducted by the Kenyan authorities. Nonetheless, in light of the Government's stated reliance on the findings of the Waki Commission, which were also one of the bases for the ICC Prosecutor's investigations,[19] and the Kenyan Government's recent request for assistance from the ICC Prosecution,[20] it is clear that there will be direct evidential overlap between the subject matter and conduct investigated by the national authorities, and the ICC cases against the Defendants.

[18] Prosecutor v. Katanga and Ngudjolo Prosecutor v. Katanga and Ngudjolo, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213, 16 June 2009 at para 92; Prosecutor v. Bemba, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, 24 June 2010, at paras 235, and 245-246.
[19] 'Request for authorisation of an investigation pursuant to Article 15', ICC-01/09-3, 26 November 2009 at para 15.
[20] Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194, ICC-01/09-58, 21 April 2011.

The Kenyan authorities are not unwilling genuinely to carry out the investigations

15. Trial Chamber II has held in the Katanga and Ngudjolo case that in determining whether a State is unwilling, the Court should base its decision on the explicit statements or actions of national authorities, in particular, whether the national authorities referred the situation to the ICC initially, and whether they have contested the surrender of the Defendants and the admissibility of the case.[21]
16. In terms of the weight which should be given to such declarations by national authorities, Trial Chamber II further determined that the Chamber could not examine the motive of national authorities to declare themselves unwilling to investigate or prosecute.[22] The Chamber also subsequently emphasised that the Court cannot interfere with the sovereign decision of a State to declare itself unwilling.[23] It logically follows from this position that the Chamber also cannot second-guess or question the motive of national authorities, who have declared themselves willing to investigate or prosecute. The drafting history of Article 17 of the Statute further demonstrates that in defining unwillingness, the State parties were reluctant to permit the ICC to rely upon overly subjective criteria.[24]
17. The Kenyan authorities have clearly evidenced their willingness to investigate the Defendants. In contrast to the Democratic Republic of Congo or Uganda, the Republic of Kenya did not refer the situation to the ICC. Whilst it has cooperated with the ICC in a manner which is consistent with its desire to ensure that the perpetrators of the

[21] Prosecutor v. Katanga and Ngudjolo, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213, 16 June 2009 at para 91 and 92.
[22] "The Chamber is not in a position to ascertain the real motives of a State which expresses its unwillingness to prosecute a particular case. A State may, without breaching the complementarity principle, refer a situation concerning its territory to the Court if it considers it opportune to do so, just as it may decide not to carry out an investigation or prosecution of a particular case. The reasons for such a decision may be because the State considers itself unable to hold a fair and expeditious trial or because it considers that circumstances are not conducive to conducting effective investigations or holding a fair trial." Prosecutor v. Katanga and Ngudjolo, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213, 16 June 2009, at para 80.
[23] "When, as in the present case, a State makes clear its unwillingness to bring the accused to justice, the fact of the matter is that a challenge to admissibility by the Defence can only be made within the scope of the expression of the sovereignty of the State in question. Even assuming that investigations had been underway in a State against an accused person for crimes wholly identical to those which are the subject of a warrant issued for his or her arrest by the Court, the expression of the unwillingness of the State to bring the accused to justice before its own courts can be such that it can only result in a Chamber declaring the case admissible. Consequently, in the face of such a clearly expressed determination, there would be no need for the Chamber to undertake a comparative assessment of the cases brought before national and international courts and, thereby, apply any given admissibility test." Prosecutor v. Katanga and Ngudjolo, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213, 16 June 2009 at para 88.
[24] S Williams and W Schabas, 'Article 17' in Triffterer,(ed.),Commentary on the Rome Statute of the International Criminal Court. (2nd edition, Hart Publishing 2008) at p. 617, para 25.

electoral violence are brought to justice, the Republic of Kenya has consistently asserted its prerogative to investigate and prosecute these cases in Kenyan Courts.[25]

18. As concerns the criteria set out in article 17(2), which elucidate the meaning of unwillingness, there is no indication that the national proceedings are being conducted for the purpose of shielding the Defendants from criminal responsibility. To the contrary, the national authorities have taken legislative steps to ensure that there will be no immunity by virtue of a defendant's official position, and have underscored the need to ensure that all cases arising from the electoral violence are investigated and prosecuted.[26]

19. Indeed, the noble objective set out in the preamble of "put[ting] an end to impunity" would be best served by deferring the current case to the Kenyan authorities, whereas a fractured approach, whereby some cases are heard before the ICC whilst others are heard before national courts, would be deleterious to such an objective.[27] By holding trials in The Hague, certain physical evidence and information may be unavailable to domestic authorities. This could engender differing verdicts on the same factual issues, which would fundamentally jeopardise the search for the truth, and hinder national efforts to achieve peace and reconciliation on the basis of national judicial findings. National courts would also have a greater ability to investigate and charge the responsible persons for the full range of crimes, including ordinary crimes, which falls outside of the jurisdiction of the ICC.

20. For these reasons, Professor Cassese has opined that:

> Plainly, it falls primarily to national prosecutors and courts to investigate, prosecute and try the numerous international crimes being perpetrated in many parts of the world. First of all, those national institutions are in the best position to do justice, for they normally constitute the forum conveniens, where both the evidence and the alleged culprit are to be found. Secondly, under international law, national or territorial states have the right to prosecute and try international crimes, and often even a duty to do so. Thirdly, national jurisdiction over those crimes is normally very broad, and embraces even

[25] Challenge at para 42.
[26] Challenge at para 11.
[27] Trial Chamber II has confirmed that the definition of unwillingness must be construed in a manner, which is consistent with the object and purposes of the Statute, including the objective to eliminate impunity. Prosecutor v. Katanga and Ngudjolo, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213, 16 June 2009, at para 78.

lesser international crimes, such as sporadic and isolated crimes, which do not make up, nor are part of, a pattern of criminal behaviour. [28]

21. National investigations and prosecutions would also strengthen the rule of law and ensure that justice is seen to be done by the local communities, who do not have the means to follow or effectively participate in remote proceedings in The Hague.
22. As regards the issue as to whether "there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice", [29] the Government has provided detailed explanations as to why the delays in the proceedings were due to reasons, which aimed to enhance the ability of Kenyan authorities to bring the perpetrators to justice, rather than the contrary.[30]
23. The time frame given by the Government for conducting the investigations is also not inconsistent with the time frame for conducting such investigations before an international court or tribunal. For example, in the Katanga and Ngudjolo case, the Prosecution filed an application for an arrest warrant over four years after the date of the events, and in the Bemba case, the Prosecution filed a request for an arrest warrant more than five years after the relevant events.
24. As concerns independence and impartiality, in the Bemba case, Trial Chamber III emphasised that it would only question the independence of a national judicial decision in exceptional circumstances.[31] In that case, the Chamber was required to determine in connection with an admissibility challenge whether a domestic judicial decision was politically motivated, and whether the judges lacked independence from the executive. The Chamber also held that in examining the propriety of domestic judicial proceedings, the Chamber required concrete evidence concerning the alleged material impropriety or irregularity, "as opposed to speculation and quotations from reports that have not been introduced properly into evidence."[32]
25. In light of the fact that the ICC is required to employ a high threshold in determining that a State is unwilling –for example, that "there was no prospect that alleged

[28] A, Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 158 EJIL 10 (1999), 144-171.
[29] Article 17(2)(b) of the Statute.
[30] Challenge at paras 2, 5, 23, 59, and 78.
[31] Prosecutor v. Bemba, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, 24 June 2010, at para 235.
[32] Prosecutor v. Bemba, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, 24 June 2010, at para 235.

perpetrators of serious crimes would be duly tried in national courts"[33] - there is no basis for finding that the Kenyan authorities are unwilling genuinely to investigate the Defendants.

The Kenyan authorities are not unable genuinely to carry out proceedings

26. The notion of "inability" of the State covers only very exceptional scenarios, such as those where there is no a central government, or where circumstances such as civil wars or natural disasters lead to the total or substantial collapse of the administration of justice or unavailability of the judicial system.[34] As noted in the ICC Prosecution Expert Report on Complementarity, "[t]he standard for showing inability should be a stringent one, as the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards.'[35]
27. Article 17(3) also sets out two cumulative criteria, and requires a causal nexus between the two:

> The term 'inability' is defined under paragraph 3 of the Article. Its wording suggests that when determining whether the state is unable to genuinely prosecute, two cumulative sets of considerations must be present: first, the collapse or unavailability of the national judicial system, and second, whether the state is unable to obtain the accused, the evidence and testimony, or is otherwise unable to carry out its proceedings. It is important to highlight that the second consideration must be the result or consequence of the first consideration. In other words, if the state is unable to obtain the accused or the necessary evidence or is otherwise unable to carry out its proceedings due to the total or substantial collapse or the unavailability of its judicial system, that state can be considered as unable to genuinely investigate or prosecute.[36]

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[33] M. C. Bassiouni, The Legislative History of the International Criminal Court: An Article - by - Article Evolution of the Statute Vol. II, (Transnational Publishers, 2005), page 121. See also on page 150, "A number of delegations stressed that the principle of complementarity should create a strong presumption in favour of national jurisdiction […]".

[34] W. Schabas in Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article, (2nd edition, Hart Publishing 2008), p. 623; See also Héctor Olásolo, The Triggering Procedure of the International Criminal Court, (Brill Academic Publishers, 2005) p. 154.

[35] Group of Experts, ICC-Office of the Prosecutor, The Principle of Complementarity in Practice, Informal Expert Paper, 2003, Annex 4, at 15,

[36] Julio Bacio Terracino, National Implementation of ICC Crimes - Impact on National Jurisdictions and the ICC, Journal of International Criminal Justice, 2007, Vol. 5, No. 2, pp421-440, at p 434.

28. As set out in the Government's Challenge, Kenya has a functioning legal system, which is available in the sense of article 17(3) to investigate the Defendants.
29. The current case can be clearly distinguished from the Kony et al case, in which the Pre-Trial Chamber took into consideration the fact that the domestic war crimes division did not have jurisdiction over Kony et al, and the inability of the national authorities to secure the arrest of the Defendants. [37]
30. In contrast, there are no impediments as concerns the Kenyan Courts' ability to exercise jurisdiction over Mr. Ruto and Mr. Sang.[38] Moreover, as both the Prosecutor and the Pre-Trial Chamber have confirmed, neither Mr. Ruto nor Mr. Sang can be considered to be flight risks.[39] They have also amply demonstrated their willingness to cooperate with prosecuting authorities, irrespective of whether they are national or international.

The present submissions are without prejudice to the right of the Defence to file an independent challenge to admissibility

31. Article 19(2) of the Statute sets out the independent right of the Defence to challenge the admissibility of the case. Pre-Trial Chamber II observed in the Kony et al case that "[n]owhere is it said that a challenge brought by either of these parties forecloses the bringing of a challenge by another equally legitimate party, nor that the right of either of the parties to bring a challenge is curtailed or otherwise affected by the Chamber's exercise of its *proprio motu* powers."[40]
32. The Chamber confirmed that the Defence cannot be compelled to join an admissibility challenge filed by another party or participant. The Defence may reserve their right to challenge admissibility independently of the State, and, if and when the Defence files a subsequent challenge, the Chamber must adjudicate the matter based on the facts and circumstances at that time, without any pre-determination.[41]
33. The Defence therefore respectfully notifies the Pre-Trial Chamber that the present observations should not be construed as a joinder in the Government's Challenge. The

[37] Prosecutor v. Kony et al, Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377, at paras 37 and 43.
[38] Challenge at para 59.
[39] 'Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang', ICC-01/09-30-RED2, at para 218; 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang', ICC-01/09-01/11-01.
[40] Prosecutor v. Kony et al, Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377 at para 25.
[41] Prosecutor v. Kony et al, Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377 at pars 25-29.

Defence is reserving its right to challenge admissibility at a subsequent stage of the proceedings, should the present Challenge be rejected. The Defence will act with due diligence, taking into consideration that at this point in time, the Prosecution has not disclosed any article 67(2) of Rule 77 materials, which may be relevant to a potential admissibility challenge.[42]

3. Relief Sought

34. The Defence for Mr. Ruto and Mr. Sang respectfully notifies the Honourable Pre-Trial Chamber that it does not oppose the Challenge, and that it is reserving its right to challenge admissibility in an independent manner at a subsequent stage of the proceedings, should the Challenge be rejected.

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

Dated this 28th day, April 2011

At Nairobi, Kenya.

[42] The Defence has a right to obtain the disclosure of information within the control of the Prosecution, which may be relevant to an admissibility challenge. See for example, Prosecutor v. Bemba, Prosecutor v. Jean-Pierre Bemba Gombo, "Decision on the defence application for additional disclosure relating to a challenge on admissibility", 2 December 2009, ICC-01/05-01/08-632, para. 18; Prosecutor v. Mbarushimana, Decision on the Defence Request for Disclosure, ICC-01/04-01/10-47, 21 January 2011; and Prosecutor v. Kony at al, Decision on Defence Counsel's "Request for conditional stay of proceedings" ICC-02/04-01/05-328, 30 October 2008, at page 6.