Cour
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International
Criminal
Court

Original: English

No. ICC-01/09-01/11 OA
Date: 17 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 Ušacka

SITUATION IN THE REPUBLIC OF KENYA

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

Public document

Decision on the "Request for an Oral Hearing Pursuant to Rule 156(3)"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

The Office of Public Counsel for Victims
Ms Paolina Massida

States Representatives
Mr Geoffrey Nice
Mr Rodney Dixon

Counsel for William Samoei Ruto
Mr Joseph Kipchumba Kigen-Katwa
Mr David Hooper
Mr Kioko Kilukumi Musau

Counsel for Henry Kiprono Kosgey
Mr George Odinga Oraro

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa

REGISTRY
Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" of 30 May 2011 (ICC-01/09-01/11-101),

Having before it the "Request for an Oral Hearing Pursuant to Rule 156(3)" dated 3 August 2011 and registered on 4 August 2011 (ICC-01/09-01/11-246),

Renders unanimously the following

DECISION

The "Request for an Oral Hearing Pursuant to Rule 156(3)" is rejected.

REASONS

I. PROCEDURAL HISTORY AND ARGUMENTS OF THE PARTIES AND PARTICIPANTS

1. On 31 March 2011, the Republic of Kenya (hereinafter: "Kenya") filed the "Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute"[1] in which it challenged the admissibility of the case against Mr William Samoei Ruto (hereinafter: "Mr Ruto"), Mr Henry Kiprono Kosgey (hereinafter: "Mr Kosgey") and Mr Joshua Arap Sang (hereinafter: "Mr Sang") as well as that of another case in the situation in Kenya, namely that against Mr Francis Kirimi Muthaura, Mr Uhuru Muigai Kenyatta and Mr Mohammed Hussein Ali. On 30 May 2011, Pre-Trial Chamber II (hereinafter: "Pre-Trial Chamber") issued its "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] (hereinafter: "Impugned Decision"), finding the case against Mr Ruto, Mr Kosgey and Mr Sang to be admissible.

[1] ICC-01/09-01/11-19.
[2] ICC-01/09-01/11-101.

2. On 6 June 2011, Kenya filed an appeal against the Impugned Decision.[3]

3. On 20 June 2011, Kenya filed the "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'"[4] (hereinafter: "Document in Support of the Appeal"). In the Document in support of Appeal Kenya indicated that it would "in due course be applying under Rule 156(3) to the Appeals Chamber to convene an oral hearing [...]".[5] Kenya also opined that "[i]t may be that the Appeals Chamber will need to assess further documentary evidence in the form of reports from Kenya concerning the investigations", which, in Kenya's view, "could only realistically be done in an oral hearing".[6]

4. On 3 August 2011, Kenya filed the "Request for an Oral Hearing Pursuant to Rule 156(3)"[7] (hereinafter: "Request for an Oral Hearing"), requesting the Appeals Chamber to hold an oral hearing on the appeal.[8] In support of its request, Kenya notes that it is the first State Party to challenge the admissibility of a case on the basis of the principle of complimentarity and the outcome of its challenge should be regarded as precedential for the present and future cases.[9] Kenya submits furthermore that, as a State Party, Kenya should be accorded respect and be permitted to appear before the Court to be heard on issues critical to its national interest.[10] Kenya underlines that the legal and factual issues on appeal are complex and novel and "cannot be comprehensively dealt with in written submissions alone".[11] In Kenya's submission, "interaction of oral argument" is required, which would also enable the Appeals Chamber to "outline its questions and concerns".[12]

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[3] "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'", ICC-01/09-01/11-109.
[4] ICC-01/09-01/11-135. A Corrigendum thereto was filed on 21 June 2011, ICC-01/09-01/11-135-Corr.
[5] Document in Support of the Appeal, para. 69.
[6] Document in Support of the Appeal, para. 69.
[7] ICC-01/09-01/11-246.
[8] Request for an Oral Hearing, para. 15.
[9] Request for an Oral Hearing, para. 9.
[10] Request for an Oral Hearing, para. 10.
[11] Request for an Oral Hearing, paras 11-12.
[12] Request for an Oral Hearing, para. 12.

5. On 5 August 2011, the Appeals Chamber ordered the Prosecutor, Mr Ruto, Mr Kosgey, Mr Sang and the victims participating in the appeal proceedings to file any response they may have to the Request for an Oral Hearing.[13] On 11 August 2011, pursuant to this order, the Office of Public Counsel for Victims (hereinafter: "OPCV") on behalf of the victims participating in the appeal filed its "Response to the Government of Kenya's 'Request for an Oral Hearing Pursuant to Rule 156(3)'"[14] (hereinafter: "OPCV's Response"); Mr Ruto and Mr Sang filed a joint "Response to Government of Kenya Request for an Oral Hearing on Admissibility"[15] (hereinafter: "Defence's Response"); and the Prosecutor filed the "Prosecution's Response to the Government of Kenya 'Request for an Oral Hearing Pursuant to Rule 156(3)'",[16] (hereinafter: "Prosecutor's Response").

6. The OPCV requests the Appeals Chamber to dismiss the Request for an Oral Hearing. The OPCV submits that the Request for an Oral Hearing is untimely because this issue should have been raised in Kenya's appeal, or in any case before all the participants to the present appeal filed their respective submissions.[17] In the view of the OPCV, as "all the legal issues raised in the Request [...] were comprehensively dealt with by way of written submissions [...]", granting the Request for an Oral Hearing would "unavoidably cause considerable delays to the present proceedings".[18] The OPCV further submits that Kenya failed to explain how an oral hearing could contribute in clarifying any factual issue.[19] The OPCV argues that as Kenya already did in its "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility" dated 4 July 2011, it is again trying to alter the scope of the appellate proceedings.[20]

7. Mr Ruto and Mr Sang jointly support Kenya's Request for an Oral Hearing. Referring to a decision of Trial Chamber II in the *Katanga* case, they submit that a State Party should be heard on a question of admissibility.[21] Furthermore, Mr Ruto

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[13] "Order on the filing of a response to the Republic of Kenya's 'Request for an Oral Hearing Pursuant to Rule 156(3)'", ICC-01/09-01/11-248.
[14] ICC-01/09-01/11-250.
[15] ICC-01/09-01/11-251.
[16] ICC-01/09-01/11-252.
[17] OPCV's Response, para. 4.
[18] OPCV's Response, para. 6.
[19] OPCV's Response, para. 7.
[20] OPCV's Response, para. 8.
[21] Defence's Response, para. 5.

and Mr Sang argue that in light of the novelty and complexity of the legal and factual issues at stake, as well as the close link between those issues and the "State sovereignty and national interest", it is "crucial" for the Appeals Chamber to "probe the nuances of each argument before reaching a decision".[22] In response to the argument that an oral hearing would delay the appellate proceedings,[23] they submit that in the absence of any specific time limit under rule 156 (3) for lodging such requests, Kenya should not be prejudiced for filing its Request for an Oral Hearing at the time that it did.[24]

8. The Prosecutor contests the alleged complexity of the pending issues, but does not take any position on the Request for an Oral Hearing. However, he suggests that if the Request for an Oral Hearing is granted, Kenya should be "expressly barred from offering new evidence or making new arguments", as this would be inconsistent with the corrective nature of the appellate proceedings.[25]

II. MERITS

9. Rule 156 (3) of the Rules of Procedure and Evidence provides that:

> The appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing.

10. This rule establishes as a norm that proceedings on appeal such as the present should be conducted by way of written submissions. The rule nonetheless also vests the Appeals Chamber with discretion to convene a hearing. However, for the Appeals Chamber to exercise its discretion and to depart from this norm it must be furnished with cogent reasons that demonstrate why an oral hearing *in lieu* of, or in addition to, written submissions is necessary.[26] In considering whether or not to exercise its discretion, the Appeals Chamber must also take into account the possible delay that the holding of an oral hearing might cause, given the requirement under rule 156 (4)

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[22] Defence's Response, paras 6 and 8.
[23] Defence's Response, para. 7.
[24] Defence's Response, para. 8.
[25] Prosecutor's Response, paras 2-3.
[26] *See Prosecutor. v. Jean-Pierre Bemba Gombo*, "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", 19 October 2010, ICC-01/05-01/08-962 (OA 3), para. 25.

of the Rules of Procedure and Evidence that "[t]he appeal shall be heard as expeditiously as possible".[27]

11. The Appeals Chamber is not persuaded that in the circumstances of the instant case, it is necessary to convene a hearing. The Appeals Chamber notes that many issues arising in appeals under rules 154 or 155 of the Rules of Procedure and Evidence are usually complex, and, particularly in the early years of the Court's existence, many of them are novel. The present appeal is no exception. However, Kenya as well as the other parties and participants to the proceedings, have been given sufficient opportunity and have addressed the issues comprehensively and exhaustively in their written submissions. Kenya has failed to provide cogent reasons that would persuade the Appeals Chamber to exercise its discretion and convene a hearing.

12. In addition, Kenya's argument that the issues on appeal require the "interaction of oral argument" to address the Appeals Chamber's "questions and concerns" is unconvincing. Assuming that the Appeals Chamber had "questions and concerns", an oral hearing would not necessarily be the only procedural option the Chamber would employ to solicit and receive answers to those "questions and concerns". The Appeals Chamber could also avail itself of regulation 28 of the Regulations of the Court to "clarify", "provide additional details" or "address specific issues" by way of written submissions. However, as stated above, under the circumstances of the present case, the Appeals Chamber does not deem it necessary to do so.

13. Finally, the Appeals Chamber notes that the Request for an Oral Hearing was made at a late stage in the proceedings. Although Kenya indicated in its Document in Support of the Appeal that it would request an oral hearing, it did not make the Request for an Oral Hearing until almost six weeks later. In the view of the Appeals Chamber, the holding of an oral hearing at such a late stage in the proceedings would unduly affect the expeditious resolution of the appeal, another factor for the rejection of the Request for an Oral Hearing.

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[27] *See P. v. Thomas Lubanga Dyilo,* "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", 8 October 2010, ICC-01/04-01/06-2582 (OA 18), para. 27.

14. In light of the above, the Request for an Oral hearing is rejected.

Done in both English and French, the English version being authoritative.

Judge Daniel David Ntanda Nsereko
Presiding Judge

Dated this 17th day of August 2011

At The Hague, The Netherlands