

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11

Date: 3 June 2014

APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng
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
AND JOSHUA ARAP SANG***

Public

**The Government of the Republic of Kenya's Request to File Amicus Submissions
in the Appeal against the Decision on Prosecutor's Application
for Witness Summonses and resulting Request for State Party Cooperation**

Source: The Government of the Republic of Kenya,
represented by the Attorney General of Kenya

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

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I. INTRODUCTION

1. On 23 May 2014, Trial Chamber V (A) granted the Defence teams for Mr William Samoei Ruto and Mr Joshua Arap Sang ("the Defence") leave to file an appeal¹ against the majority's *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*.² The Chamber, by majority (Judge Eboe-Osuji dissenting), certified two issues for appeal:

- i. Whether a chamber has the power to compel the testimony of witnesses ('First Issue');
- ii. Whether the Government of Kenya, a State party to the Rome Statute, is under an obligation to cooperate with the Court to serve summonses and assist in compelling the appearance of witnesses subject to a subpoena ('Second Issue').

2. The Government of the Republic of Kenya ('Government') hereby requests leave pursuant to **Rule 103 (1)** to file *amicus curiae* observations for the assistance of the Appeals Chamber, in relation to the Second Issue.

II. PROCEDURAL HISTORY

3. The Government has previously been invited by Trial Chamber V (A) to submit observations on the Second Issue.³ Indeed, the Government made the requested submissions both orally⁴ and in writing⁵. The Government was also granted leave to file *amicus* observations in respect to whether this issue should be certified for appeal, as the Trial Chamber acknowledged that the

¹ Prosecutor v. Ruto and Sang, *Decision on defence applications for leave to appeal the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" and the request of the Government of Kenya to submit amicus curiae observations*, (ICC-01/09-01/11-1313) 23 May 2014 ("Decision on LTA").

² Prosecutor v. Ruto and Sang, *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*, (ICC-01/09-01/11-1274-Corr2) 17 April 2014.

³ Prosecutor v. Ruto and Sang, *Decision on status conference and additional submissions related to "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses"* (ICC-01/09-01/11-1165) 29 January 2014.

⁴ See, ICC-01/09-01/11-T-86-Red, Transcript of Oral Hearing, 14 February 2014.

⁵ Prosecutor v. Ruto and Sang, *The Government of the Republic of Kenya's Submissions on the 'Prosecution's Request under Article 64(6)(b) and Article 93 to Summon Witnesses'* (ICC-01/09-01/11-1184) 10 February 2014.

Government of the Republic of Kenya was the entity against which the disposition of the Impugned Decision is, in part, directed.⁶

III. APPLICABLE LAW

4. Rule 103 of the ICC Rules states thus:

- '1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.
2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.
3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.'

IV. SUBMISSIONS

5. The Government of the Republic of Kenya submits that it is desirable for the Appeals Chamber to entertain additional observations from the Government, as it has participated substantively in both the written and oral proceedings that formed the basis for the majority's Impugned Decision. In addition, the assistance and cooperation of the Government of the Republic of Kenya is essential, indeed critical and indispensable, to the successful implementation of the Decision, should it stand. Therefore, it is only fair that the Government be provided an exhaustive opportunity to dialogue with the Court through formal pleadings, in order to arrive at a just conclusion, which takes into account the Court's responsibilities to search for the truth and the State's responsibilities to uphold the Rome Statute in accordance with its national constitutional and legal framework.
6. Notably, the Appeals Chamber in this case has previously determined that where there is a "novel" issue needing resolution, it is desirable to hear from

⁶ Supra note 1, para. 34 and p. 23.

States Parties through *amici curiae* observations. Previously, the novel issue was in relation to whether Mr. William Ruto could be excused from portions of his trial in order to better fulfil his constitutional duties as Deputy President of the Republic of Kenya.⁷ That issue impacted on the interests of States Parties in much the same way as the current issue of obligating a State to compel witnesses to attend the trial and give testimony does. This issue is novel in the sense that the ICC has never before requested the cooperation of a State Party in compelling witness testimony. Therefore, it is also desirable to hear from a State Party in relation to the novel issue arising from this Decision.

7. The Government of the Republic of Kenya notes that the Appeals Chamber shall determine what time limits apply to such observations. The Government wants the summons issues resolved as expeditiously as possible, and therefore, if leave is granted, it does not want its *amicus* observations to delay the process. The Government therefore suggests that it be given five days from the date of the filing of the Defence appeals to file its own observations. That will still give the Prosecutor five days to incorporate any response it may wish to make to the Government's observations into its overall response to the appeals.⁸

V. RELIEF REQUESTED

8. The Government requests leave pursuant to **Rule 103(1)** of the Rules to file *amicus* observations on the Second Issue identified on appeal.

⁷ The Appeals Chamber granted the requests of the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda to file *amici curiae* observations in respect of the Excusal Decision. *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-942 OA5, Decision on the requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence, 13 September 2013.

⁸ In any event, the Prosecutor always complains that the Government's submissions do nothing more than parallel those of the Defence, so the Prosecutor should be well-equipped to respond to all issues at once. ICC-01/09-01/11-1309, para. 41.

9. If granted, the Government requests that it be given five days from the time that the Defence files its appeal to submit its observations.

Respectfully Submitted,



Githu Muigai, SC

Attorney General of the Republic of Kenya

Dated 3 June 2014

At Nairobi, Kenya