



Original: English

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

Date: 23 September 2015

THE APPEALS CHAMBER

Before: Judge Piotr Hofmanski, Presiding Judge
 Judge Silvia Fernandez de Gurmendi
 Judge Christine Van den Wyngaert
 Judge Howard Morrison
 Judge Peter Kovacs

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 for Leave pursuant to Rule 103 (1) of the ICC Rules of Procedure and Evidence to join as *Amicus Curiae* and make Observations in the Appeal, by the Ruto and Sang Defence Teams, of the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'

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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**Unrepresented Applicants
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Government of the Republic of Kenya humbly seeks the leave of the Appeals Chamber to file *amicus curiae* observations on the first appealable issue formulated by Trial Chamber V(A) ('the Trial Chamber') in the '*Public Redacted Version of Decision on the Defence's Applications for Leave to Appeal the "Decision on Prosecution Request for Admission of Prior Recorded Testimony"*'¹ ('Decision on Defence Applications for Leave'), for the assistance of the Appeals Chamber. In particular the first appealable issue is stated as follows:
 - 'i. Whether the amended Rule 68 of the Rules can be applied in this case without offending Articles 24(2) and 51(4) of the Statute ('First Issue')'²

II. BACKGROUND

2. On 19 August 2015, the Trial Chamber issued majority '*Decision on Prosecution Request for Admission of Prior Recorded Testimony*'³ ('the Majority Trial Chamber Decision'),⁴ by which it admitted into evidence prior recorded testimony of five undisclosed witnesses pursuant to the amended **Rule 68** of the International Criminal Court (ICC) Rules of Procedure and Evidence ('ICC Rules').
3. The Majority Trial Chamber Decision was made in determination of the '*Public redacted version of "Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses", 29 April 2015, ICC-01/09-01/11-1866-Conf*

¹ (Public redacted version) ICC-01/09-01/11-1953-Red-Corr, 11 September 2015.

² (Public redacted version) ICC-01/09-01/11-1953-Red-Corr, 11 September 2015, para. 20(i).

³ (Public redacted version) ICC-01/09-01/11-1938-Corr-Red2, 28 August 2015.

⁴ Presiding Judge Chile Eboe-Osuji issued '*Separate, Partly Concurring Opinion of Judge Eboe-Osuji on the "Decision on Prosecution Request for Admission of Prior Recorded Testimony"*' (Public redacted version) ICC-01/09-01/11-1938-Anx-Red, 19 August 2015.

+ *Annexes*⁵ (‘Prosecution’s Request for Admission of Prior Recorded Testimony’).

4. On 25 August 2015 the defence team of Mr. Joshua Arap Sang filed ‘*Public Redacted Version of Confidential Sang Defence Request for Leave to Appeal the Decision on Prosecution Request for Admission of Prior Recorded Testimony*’⁶ (‘Sang Request for Leave’), seeking leave to appeal particular issues of the Majority Trial Chamber Decision.
5. On 26 August 2015 the defence team of Mr. William Samoei Ruto filed ‘*Public redacted version of “Ruto Defence application for leave to appeal the “Decision of Prosecution Request for Admission of Prior Recorded Testimony”*’⁷ (‘Ruto Request for Leave’), seeking leave to appeal particular issues of the Majority Trial Chamber Decision.
6. On 10 September 2015 the Trial Chamber issued the Decision on Defence Applications for Leave. In the said decision, the Trial Chamber reformulated the issues for appeal raised by the defence teams in their respective applications for leave, into seven appealable issues, which are as follows:
 - i. ‘Whether the amended Rule 68 of the Rules can be applied in this case without offending Articles 24(2) and 51(4) of the Statute (‘First Issues’);
 - ii. Whether written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can qualify as “prior recorded testimony” for the purpose of Rule 68(2)(c) and (d), to be admitted for the truth of their contents (‘Second Issue’);

⁵ (Public) ICC-01/09-01/11-1866-Red, 21 May 2015.

⁶ ICC-01/09-01/11-1939-Red, 25 August 2015.

⁷ ICC-01/09-01/11-1940-Red, 26 August 2015.

- iii. Whether written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can be admitted in their entirety for the purpose of Rule 68(2)(c) and (d) ('Third Issue');
- iv. Whether the Impugned Decision erred in its assessment of the concept of "failure to give evidence with respect to a material aspect" pursuant to Rule 68(2)(d)(i) of the Rules ('Fourth Issues');
- v. Whether the Impugned Decision applied the appropriate standard of proof when evaluating whether the conditions under Rule 68(2)(c) and (d) of the Rules were met, including, in particular, in its assessment of the existence of "interference" ('Fifth Issue');
- vi. Whether the Impugned Decision erred in its interpretation and/or application of the concepts of "indicia of reliability" and "acts and conduct of the accused" pursuant to Rule 68(2)(c) and (d) of the Rules ('Sixth Issue'); and
- vii. Whether the Impugned Decision erred in its consideration of 'interests of justice' pursuant to Rule 68(2)(d) of the Rules ('Seventh Issue').

III. JUSTIFICATION FOR REQUEST FOR LEAVE

7. The Government of the Republic of Kenya respects the Majority Trial Chamber Decision that was made pursuant to the amended **Rule 68** of the ICC Rules, a rule which it actively participated in its negotiation and adoption at the twelfth (12th) Session of the Assembly of States Parties ('the Assembly').
8. As stated above, the Government of the Republic of Kenya actively participated in the negotiations leading up to the adoption of the amended **Rule 68**. The Government of the Republic of Kenya believes that it has important observations to make to the Appeals Chamber regarding the negotiations leading up to the adoption of the amended **Rule 68**. The Government of the Republic of Kenya believes that these observations may be

useful to the Appeals Chamber in determining the application of the amended **Rule 68** in the ongoing cases before the Court.

9. The Government of the Republic of Kenya supports the work of the Court and has a longstanding cooperation relationship with the Court, dating back to its signing of the Rome Statute on 11 August 1999; and following this up with the deposit of its instrument of ratification to the Rome Statute on 15 March 2005. Moreover, Kenya is a fully paid up State Party to the Rome Statute.
10. Beyond its expression of consent to be bound to the Rome Statute, the Republic of Kenya has taken its responsibilities under the Statute seriously by being one of the few, but growing number of, States Parties to have enacted domestic implementing legislation for the Rome Statute, particularly the **International Crimes Act, No. 16 of 2008**; which creates a structure for providing judicial assistance and cooperation to the Court, in keeping with its obligations under the Rome Statute.
11. Other than legislative and administrative action taken by the Government of the Republic of Kenya in order to provide a structure for cooperation with the Court, the Government of the Republic of Kenya's support for the work of the Court was actively demonstrated by its cooperation in assisting the Court in investigations and Prosecution, as required by **Article 86** of the Rome Statute, even before the Republic of Kenya became a situation country at the ICC in 2009; and prior to the commencement of the Court's investigations into the situation in Kenya on 31 March 2010, subsequent to the issuance of majority *'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya'*.⁸ In particular, in late 2009 the Government of the Republic handed over to the ICC the evidence

⁸ (Public) ICC-01/09-19-Corr, 1 April 2010. The late Judge Hans Peter Kaul appended a dissenting opinion to the decision.

collected by the independent and impartial Commission of Inquiry into Post Election Violence (CIPEV / 'the Commission'), as well as a list of the names of those suspected to have committed crimes within the jurisdiction of the ICC, during the post election violence (PEV) period.

12. Since that time the Government of the Republic of Kenya has continued cooperation with the Court in its investigations and prosecution. Most of the cooperation efforts are confidential since they are based on confidential requests which cannot be disclosed in this document, but which the Appeals Chamber is fully aware of.

13. Moreover, the Government of the Republic of Kenya has persisted in cooperating with the Court, not as a matter of convenience but as a matter of responsibility. This has been demonstrated where the Government of the Republic of Kenya has sought to promptly and harmoniously resolve challenges that existed in the implementation of the Court's requests. Most recently, this was demonstrated in connection to the *'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'*⁹

14. From the foregoing discussion, the Government of the Republic of Kenya's commitment in assisting and supporting the work of the Court in the collection of evidence and prosecution clearly did not commence with its involvement in the negotiation and adoption of the amended **Rule 68** of the ICC Rules, but it has been a longstanding commitment. For this reason, the Government of the Republic would be grateful to the Appeals Chamber for an opportunity to make observations in the appeal of the defence teams of Mr. Ruto and Mr. Sang on the First Issue identified by the Trial Chamber, which constitutes the first appealable issue; and assist the Appeals Chamber in

⁹ (Public) ICC-01/09-01/11-1274-Corr2, 30 April 2014.

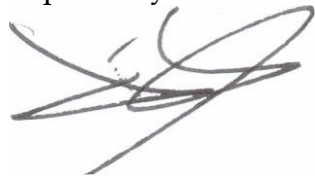
appreciating the context in which the Assembly adopted the amended **Rule 68** of the ICC Rules. This maybe useful to the Appeals Chamber in interpreting the scope of the amended **Rule 68** of the ICC Rules and consequently determining whether it is applicable in the present case.

15. Moreover, the contested application of the amended **Rule 68** of the ICC Rules may have a significant impact on the fundamental human rights of the accused persons who are citizens of the Republic of Kenya; and whom the Republic as a State Party, through its government, is obligated to ensure that they have been subjected to the full protection of the law accorded by the Rome Statute and the ICC Rules. It is for this reason also, that the Government of the Republic of Kenya would be grateful to the Appeals Chamber for an opportunity to make observations to the Appeals Chamber on the impact of the application of the amended **Rule 68** of the ICC Rules to the present case.

IV. RELIEF REQUESTED

16. The Government of the Republic of Kenya humbly requests leave of the Appeals Chamber to file *amicus curiae* observations, pursuant to **Rule 103(1)** of the ICC Rules, in the appeal of the defence teams of Mr. Ruto and Mr. Sang, on the First Issue of appeal formulated by the Trial Chamber in the Decision on Defence Applications for Leave.

Respectfully Submitted,



Githu Muigai, SC

Attorney General of the Republic of Kenya

Dated 23 September 2015

At Nairobi