



Original: **English**

No.: ICC-01/09-01/11
Date: **25 September 2015**

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Péter Kovács

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR V. WILLIAM SAMOEI RUTO
AND JOSHUA ARAP SANG***

Public

**Request for Leave to Respond to the Government of the Republic of Kenya's
Request to Participate as *Amicus Curiae* in the Appeal concerning the
"Decision on Prosecution Request for Admission of Prior Recorded Testimony"
(ICC-01/09-01/11-1972)**

Source: Office of the Prosecutor

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

Ms Fatou Bensouda, Prosecutor

Mr James Stewart

Ms Helen Brady

Counsel for William Samoei Ruto

Mr Karim Khan

Mr David Hooper

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Ms Caroline Buisman

Legal Representatives of Victims

Mr Wilfred Nderitu

Office of Public Counsel for Victims

Ms Paolina Massidda

Office of Public Counsel for Defence**States' Representatives**

Mr Githu Muigai

Attorney-General, Republic of Kenya

Amicus Curiae**REGISTRY**

Registrar

Mr Herman von Hebel

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations Other
Section**

1. On 23 September 2014, the Government of the Republic of Kenya requested leave, under rule 103(1) of the Rules of Procedure and Evidence, to participate in the appeal of the Trial Chamber's "Decision on Prosecution Request for Admission of Prior Recorded Testimony".¹
2. The Government of Kenya asserts that it "has important observations to make to the Appeals Chamber regarding the negotiations leading up to the adoption of the amended Rule 68" on the basis that it "actively participated" in those negotiations.² It further submits that its request should be granted because of its "longstanding commitment" to the Court,³ and the possible "significant impact" of the appeal "on the fundamental human rights" of Mr Ruto and Mr Sang, who are citizens of Kenya.⁴
3. The Prosecution notes the established jurisprudence of the Appeals Chamber that "the Prosecutor is not entitled to respond to an application under rule 103(1) [...] without the leave of the Appeals Chamber."⁵
4. In the particular circumstances of this case, however, and having regard to the Trial Chamber's rejection in this context of a similar application,⁶ the Prosecution hereby seeks leave to respond to the Request, to explain the basis for its objection.

Word count: 600⁷

¹ See ICC-01/09-01/11-1972 ("Request"); ICC-01/09-01/11-1938-Corr-Red2 ("Decision"). The Prosecution notes that the Request seeks leave only to make observations on the first issue certified for appeal by the Trial Chamber ("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"): see Request, paras. 1, 6, 14, 16.

² See Request, paras. 7-8. See also para. 14 (suggesting that the Government of Kenya may "assist the Appeals Chamber in appreciating the context in which the Assembly [of States Parties] adopted the amended Rule 68").

³ Request, para. 14. See further paras. 9-13.

⁴ Request, para. 15.

⁵ See e.g. ICC-02/05-01/09-51 OA, para. 8; ICC-01/05-01/08-602 OA2, para. 7.

⁶ See ICC-01/09-01/11-1893. The rejection of the Government of Kenya's similar application before the Trial Chamber is not mentioned in the Request.

⁷ The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32. The Prosecution draws the attention of the Government of Kenya to this requirement in filings submitted to the Appeals Chamber, as it has previously been reminded: see ICC-01/09-01/11-1598 OA7 OA8, para. 26.

A handwritten signature in blue ink, appearing to read 'Bensouda', with a horizontal line drawn through it.

Fatou Bensouda, Prosecutor

Dated this 25th day of September 2015

At The Hague, The Netherlands