

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/09-01/11 OA 10**

**Date: 29 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 document**

**Decision on the Prosecutor's "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)"**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Ms Helen Brady

**Counsel for William Samoei Ruto**

Mr Karim Khan  
Mr David Hooper

**Legal Representatives of Victims**

Mr Wilfred Nderitu

**Counsel for Joshua Arap Sang**

Mr Joseph Kipchumba Kigen-Katwa  
Ms Caroline Buisman

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

**Requesting Amicus Curiae**

Mr Githu Muigai, SC, Attorney General of  
the Republic of Kenya on behalf of the  
Government of the Republic of Kenya

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**Registrar**

Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony” of 19 August 2015 (ICC-01/09-01/11-1938-Red-Corr),

Having before it the Prosecutor’s “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)” of 25 September 2015 (ICC-01/09-01/11-1974),

*Renders* the following

## DECISION

1. The above-mentioned request is granted.
2. The Prosecutor, Mr William Samoei Ruto and Mr Joshua Arap Sang may file a response to “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’”, dated 23 September 2015 and registered on 24 September 2015 (ICC-01/09-01/11-1972) by 16h00 on Thursday, 1 October 2015.

## REASONS

### I. PROCEDURAL HISTORY

1. On 10 September 2015, Trial Chamber V(A) (hereinafter: “Trial Chamber”) granted Mr William Samoei Ruto (hereinafter: “Mr Ruto”) and Mr Joshua Arap Sang

(hereinafter: “Mr Sang”) leave to appeal<sup>1</sup> its “Decision on Prosecution Request for Admission of Prior Recorded Testimony” of 19 August 2015.<sup>2</sup>

2. On 24 September 2015, the Government of the Republic of Kenya (hereinafter: “Kenya”) filed an application seeking leave to present *amicus curiae* observations in the instant case pursuant to rule 103 (1) of the Rules of Procedure and Evidence on the first issue certified on appeal, namely, whether the amended rule 68 of the Rules of Procedure and Evidence can be applied without infringing articles 24 (2) and 51 (4) of the Statute in the present case<sup>3</sup> (hereinafter: “Kenya’s Application”).

3. On 25 September 2015, the Prosecutor filed a request for leave to respond to Kenya’s Application<sup>4</sup> (hereinafter: “Prosecutor’s Request”). In support of her request, the Prosecutor submits that in light of the particular circumstances of the present case and the fact that the Trial Chamber has rejected a similar application from Kenya, leave to respond to Kenya’s Application is sought in order “to explain the basis of [her] objection” thereto.<sup>5</sup>

## II. MERITS

4. Rule 103 (1) of the Rules of Procedure and Evidence provides that “[a]t 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”. The Appeals Chamber recalls that the Prosecutor is not entitled, as a

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<sup>1</sup> “Decision on the Defence’s Applications for Leave to Appeal the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’”, ICC-01/09-01/11-1953-Conf-Corr; a public redacted version was registered on 10 September 2015 (ICC-01/09-01/11-1953-Red); a corrigendum to the public redacted version was registered on 11 September 2015 (ICC-01/09-01/11-1953-Red-Corr).

<sup>2</sup> Dated 19 August 2015 and registered on 28 August 2015, ICC-01/09-01/11-1938-Conf-Corr; a public redacted version was registered on 19 August 2015 (ICC-01/09-01/11-1938-Red-Corr); a public redacted version of the corrigendum was registered on 28 August 2015 (ICC-01/09-01/11-1938-Corr-Red2). *See also* “Partly Concurring Opinion of Judge Eboe-Osuji on the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’”, dated 19 August 2015 and registered on 28 August 2015, ICC-01/09-01/11-1938-Conf-Anx-Corr; a public redacted version was registered on the same date (ICC-01/09-01/11-1938-Anx-Corr-Red2).

<sup>3</sup> “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’”, dated 23 September 2015, ICC-01/09-01/11-1972, para. 1.

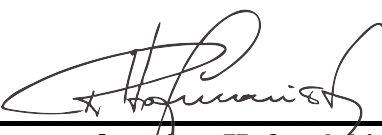
<sup>4</sup> “Request for Leave to Respond to the Government of the Republic of Kenya’s Request to Participate as *Amicus Curiae* in the Appeal concerning the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’ (ICC-01/09-01/11-1972)”, ICC-01/09-01/11-1974.

<sup>5</sup> Prosecutor’s Request, para. 4.

matter of law, to respond to an application made under rule 103 (1) of the Rules of Procedure and Evidence without having sought leave before the Appeals Chamber.<sup>6</sup>

5. In the circumstances of the present case, the Appeals Chamber finds that it is in the interests of justice to grant the Prosecutor's request. The Appeals Chamber further considers that it is appropriate to allow Mr Ruto and Mr Sang to respond to Kenya's Application at the same time. Accordingly, the Prosecutor, Mr Ruto and Mr Sang may file their respective responses to Kenya's Application by 16h00 on Thursday, 1 October 2015.

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

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**Judge Piotr Hofmański**  
**Presiding Judge**

Dated this 29<sup>th</sup> September 2015

At The Hague, The Netherlands

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<sup>6</sup> See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Reasons for 'Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply'", 9 November 2009, ICC-02/05-01/09-51, para. 8; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the application of 14 September 2009 for participation as an *amicus curiae*", 9 November 2009, ICC-01/05-01/08-602, para. 7.