



Original: **English**

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

Date: **1 October 2015**

**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**

**Sang Defence Response to the Government of the Republic of Kenya's  
Request for Leave pursuant to Rule 103 (1) 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: **Defence for Joshua arap Sang**

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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**Office of Public Counsel for Victims**

**Office of Public Counsel for the Defence**

**States' Representatives**

**Amicus Curiae**

Government of the Republic of Kenya  
Attorney General Githu Muigai, SC

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**REGISTRY**

**Registrar**

Herman von Hebel

**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

## I. INTRODUCTION

1. The Trial Chamber has granted the Defence for Mr Joshua arap Sang and the Defence for Mr William Samoei Ruto the opportunity to appeal seven issues<sup>1</sup> arising from its *Decision on Prosecution Request for Prior Recorded Testimony*.<sup>2</sup> The first of those issues is “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”.<sup>3</sup>
2. The Government of the Republic of Kenya (“GOK” or “Government”) has filed a Rule 103(1) request for leave to submit observations in relation to this issue (“Application”).<sup>4</sup> At the request of the Prosecution,<sup>5</sup> the Appeals Chamber has exceptionally, in the “circumstances of the present case”, granted the parties leave to respond to the Application.<sup>6</sup>
3. The Defence for Mr Joshua arap Sang (“Defence”) supports the Government’s Application as its observations will be “desirable for the proper determination of the case” and are in the interests of justice.

## II. SUBMISSIONS

4. The Appeals Chamber has the full discretion under Rule 103(1) to allow the Government to make observations at this stage.<sup>7</sup> This discretion is not circumscribed in any way but should be exercised so as to promote a fair trial.
5. The fact that the Trial Chamber previously declined to accept the Government’s observations,<sup>8</sup> on the basis that it “could not privilege a limited number of States Parties’ views over the collective will of the ASP reflected in the resolution

<sup>1</sup> ICC-01/09-01/11-1953-Red-Corr, 11 September 2015.

<sup>2</sup> ICC-01/09-01/11-1938-Corr-Red2, 28 August 2015.

<sup>3</sup> ICC-01/09-01/11-1953-Red-Corr, 11 September 2015, para. 20(i).

<sup>4</sup> ICC-01/09-01/11-1972, 24 September 2015, paras 1 and 16.

<sup>5</sup> ICC-01/09-01/11-1974, 25 September 2015.

<sup>6</sup> ICC-01/09-01/11-1975, 29 September 2015, para 5.

<sup>7</sup> For example, ICC-01/05-01/08-602 OA2, 9 November 2009, para 10; ICC-01/04-01/06-1289, 22 April 2008.

<sup>8</sup> ICC-01/09-01/11-1893, 29 May 2015, para 4 (“The Chamber considers that the observations from the Kenyan Government as regards its participation in the negotiation process of the amended Rule 68 of the Rules are neither necessary nor appropriate for the Chamber’s judicial determination on this matter, namely the legal interpretation and application of Rule 68 of the Rules”).

amendeing Rule 68”,<sup>9</sup> does not preclude the Appeals Chamber from considering the Government’s renewed request, albeit similar in nature. Procedurally speaking, it would have been almost impossible for the Government to have sought leave to appeal the Trial Chamber’s rejection of its request, as the text of Article 82(1)(d) limits that right to “parties”. Therefore the Government’s sole option is to make this renewed request to be heard directly to the Appeals Chamber.

6. Nothing in the Statute or Rules prevents an amicus applicant from submitting observations on a mixed question of law and fact, especially given that Rule 103(1) is drafted in a broad form, ie “any observation on any issue” that the Chamber deems appropriate. For instance, Chambers have previously allowed observations where: a lawyer for a witness provided “new information” about the status of his client’s safety, physical and psychological well-being,<sup>10</sup> the Special Representative of the Secretary-General of the United Nations for Children and Armed Conflict supplied “information and assistance of direct relevance on certain issues that otherwise [would] not be available to the Court”,<sup>11</sup> and the organizations Redress Trust and Lawyers for Justice in Libya supplied information on the state of the judiciary and security situation in Libya and the experiences of victims of crimes there.<sup>12</sup> Indeed, the Appeals Chamber has previously allowed amicus submissions from the International Criminal Bar, where the association had “actively participated in consultations with the Registry, for example in respect of the legal aid scheme and the Code of Professional Conduct”.<sup>13</sup> Thus the Government’s statement that it has “important observations to make ... regarding the negotiations leading up to the adoption of the amended Rule 68” falls easily within the realm of acceptable submissions. Indeed, the Kenyan Government is in the position to have relevant information which no other party to the proceedings has; its submissions will not merely repeat submissions already provided.<sup>14</sup>
7. To the contrary, the Government’s observations will touch on factual issues which perhaps other parties or participants or States are not privy to. The observations may

<sup>9</sup> ICC-01/09-01/11-1938-Red, para 18.

<sup>10</sup> ICC-01/04-01/06-2821, 15 November 2011, para 8.

<sup>11</sup> ICC-01/04-01/06-1175, 18 February 2008, para 7.

<sup>12</sup> ICC-01/11-01/11-153, 18 May 2012, paras 3, 6.

<sup>13</sup> ICC-01/04-01/06-1289 OA11, 22 April 2008, para 2.

<sup>14</sup> *Contra*, ICC-01/05-01/08-602 OA2, 9 November 2009, para 11.

therefore supply information that would enable the Appeals Chamber to determine whether to remand the issue to the Trial Chamber for further investigations or to elicit additional evidence as to the negotiations process. In this regard, the Defence recalls that Article 69(3) gives the Court the authority to “request the submission of all evidence that it considers necessary for the determination of the truth”. The Defence notes that Article 69 falls within “Part 6. The Trial” of the Rome Statute; in this instance, the Appeals Chamber is determining an interlocutory issue, during the trial proceedings, and thus this provision is applicable to its powers as well.

8. Whether Rule 68 as amended should apply to cases from the Kenyan Situation is a live issue on appeal, as even Judge Monageng, who requested to be excused from the hearings, acknowledged:

The reason for this request centres on allegations reported in various news articles about assurances given by Court officials, prior to the adoption of the proposed amendment to rule 68 of the Rules of Procedure and Evidence, by the Assembly of States Parties (ASP) at its Twelfth Session held in November 2013. The alleged assurances concern the non-retroactive application of the rule change to the Kenyan cases. While I consider these allegations to be entirely without foundation or merit, **it is my considered opinion that my discussions with various states parties on the proposed amendment in the process leading up to its adoption may be construed as having a bearing on this appeal.** This is because one of the issues on appeal relate to the Trial Chamber’s **finding that the principle of non-retroactivity does not apply to this particular rule change.** Accordingly, I request to be excused from the present appeal ahead of any concerns being raised as to my impartiality.<sup>15</sup>

While the Judge denies having given such an assurance, it is in the interests of justice for the Appeals Chamber to have available to it all pertinent information when considering that aspect of the appeal.

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<sup>15</sup> ICC-01/09-01/11-1968-Anx, 18 September 2015, pp. 1-2.

### III. RELIEF REQUESTED

9. In granting leave to appeal, the Trial Chamber has already determined that this issue is one which significantly affects the fair conduct of the proceedings. Therefore, the Appeals Chamber should strive to make an independent and fully informed decision, taking into account all relevant evidence and arguments.
10. The Defence consequently supports the Application by the Government of the Republic of Kenya to make observations pursuant to Rule 103(1) on the First Issue identified for appeal.

[Word count: 1409<sup>16</sup>]

Respectfully submitted,




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Joseph Kipchumba Kigen-Katwa  
On behalf of Mr Joshua arap Sang  
Dated this 1<sup>st</sup> day of October 2015  
In Nairobi, Kenya

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<sup>16</sup> This certification is made in compliance with para 26, ICC-01/09-01/11-1598, 9 October 2014.