

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **9 October 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 Additional Requests to Participate as *Amicus Curiae* in the Appeal concerning the
“Decision on Prosecution Request for Admission of Prior Recorded Testimony”**

Source: Office of the Prosecutor

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

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1. On 29 September 2015, the Appeals Chamber granted leave to the Parties to respond to the application by the Government of the Republic of Kenya, 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 The Prosecution opposed the Government of Kenya’s application.²

2. The Commission of the African Union, the Government of the Republic of Uganda, and the Government of the Republic of Namibia now also seek leave to participate in this appeal.³

3. Like the Government of Kenya, the Commission of the African Union and the Government of Namibia wish to intervene only on the first issue certified for appeal.⁴ In this context:

- The Government of Namibia wishes to give its view of “the legitimate expectations of States Parties that negotiated the text of the amended rule”.⁵
- The Commission of the African Union wishes to address the “legal history, relationship, hierarchy, and implications of various interpretations of the amended rule and the inter-related statutory provisions on the fairness of future ICC trials”.⁶ In particular, it wishes to make submissions “whether the Prosecutor made an undertaking or unilaterally assumed a legal obligation”

¹ See ICC-01/09-01/11-1975. See also ICC-01/09-01/11-1938-Corr-Red2.

² See ICC-01/09-01/11-1977.

³ See ICC-01/09-01/11-1983-Anx (“AU Request”); ICC-01/09-01/11-1984-Anx (“Uganda Request”); ICC-01/09-01/11-1985-Anx (“Namibia Request”).

⁴ See AU Request, para. 17; Namibia Request, para. 3.

⁵ Namibia Request, para. 4.

⁶ AU Request, para. 18. See also paras. 25 (noting that the AU has an interest in ensuring that “African suspects and other persons before the Court” enjoy the right to a fair trial, and submitting that the complexity of issues in this appeal “may have been further compounded by the length of the Trial Chamber opinions on Rule 68 as well as disputes over its negotiation”), 33.

concerning rule 68,⁷ and asserts that the “official drafting history of Rule 68” is “limited, incomplete and sometimes ambiguous”.⁸ The Commission of the African Union also expresses concern about “a blanket one-size fits all approach to the implementation of the ICC’s processes” in the context of “the specific and sometimes evolving needs of each unique African situation.”⁹

4. In distinction from the other requests for *amicus curiae* status, the Government of Uganda wishes to intervene on the first, second, and seventh issues certified for appeal.¹⁰ Like the Government of Namibia, however, the Government of Uganda wishes to address “[t]he legitimate expectations of States Parties that negotiated the text of the amended rule”.¹¹

5. 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.”¹²

6. In the particular circumstances of this case, however, and having regard to its objection to the application by the Government of Kenya, the Prosecution hereby seeks leave to respond to the new requests under rule 103(1), to explain the basis for its objection.

⁷ AU Request, para. 29. *See also* para. 30 (asserting that there is an “imbalance of information [...] between the parties to the case”).

⁸ AU Request, para. 31.

⁹ AU Request, para. 32.

¹⁰ Uganda Request, para. 3.

¹¹ Uganda Request, para. 6.

¹² *See e.g.* ICC-02/05-01/09-51 OA, para. 8; ICC-01/05-01/08-602 OA2, para. 7.

Word count: 787¹³



Fatou Bensouda, Prosecutor

Dated this 9th day of October 2015

At The Hague, The Netherlands

¹³ The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.