



Original: English

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

Date: 12 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 document

**Decision on applications for leave to submit *amicus curiae* observations pursuant
to rule 103 of the Rules of Procedure and Evidence**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
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 leave to appear as *amici curiae*
Mr Githu Muigai, SC, Attorney General of
the Republic of Kenya on behalf of the
Government of the Republic of Kenya

Mr Fredrick Ruhindi, MP, Attorney General
of the Republic of Uganda on behalf of the
Government of the Republic of Uganda

Mr Sakeus Shanghala, MP, Attorney General
of the Republic of Namibia on behalf of the
Government of the Republic of Namibia

Prof. Charles Chernor Jalloh on behalf of the
African Union Commission

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-Corr-Red2),

Having before it “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),

Having before it the “African Union Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence on the Rule 68 Amendments at the Twelfth Session of the ICC Assembly of States Parties” dated 5 October 2015 and registered on 7 October 2015 (ICC-01/09-01/11-1983-Anx),

Having before it “The Government of Uganda Request under Rule 103(1) of the Rules of Procedure and Evidence for Leave to Submit Observations in the Appeal on the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’ (ICC-01/09-01/11-1938-Red, 19 August 2015)” dated 5 October 2015 and registered on 7 October 2015 (ICC-01/09-01/11-1984-Anx),

Having before it “The Government of The Republic of Namibia, Pursuant to Rule 103(1) Request for Leave to Submit Observations as *Amicus Curiae* in the Appeal on the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’ (ICC-01/09-01/11-1938-Corr-Red2, 19 August 2015)” dated 5 October 2015 and registered on 7 October 2015 (ICC-01/09-01/11-1985-Anx),

Having before it the “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’” of 9 October 2015 (ICC-01/09-01/11-1986),

Renders the following

DECISION

1. The above-mentioned request of the Prosecutor to respond to some of the *amicus curiae* applications is rejected.
2. The African Union Commission may submit written observations on the issue identified in its above-mentioned application, of no more than 20 pages, by 16h00 on Monday, 19 October 2015.
3. The Prosecutor, Mr William Samoei Ruto and Mr Joshua Arap Sang may respond to the observations of the African Union Commission by 16h00 on Monday, 26 October 2015.
4. The above-mentioned applications by the Government of the Republic of Kenya, the Government of the Republic of Uganda and the Government of the Republic of Namibia are rejected.
5. Any further application for leave to make submissions under rule 103 of the Rules of Procedure and Evidence must be filed by 16h00 on Monday, 19 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 appeal¹ its “Decision on Prosecution Request for Admission of Prior Recorded Testimony” of 19 August 2015² (hereinafter: “Impugned Decision”).

¹ “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).

² Dated 19 August 2015 and registered on 28 August 2015, ICC-01/09-01/11-1938-Conf; 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

2. On 24 September 2015, the Government of the Republic of Kenya (hereinafter: “Kenya”) filed an application to present *amicus curiae* observations in the instant case pursuant to rule 103 (1) of the Rules of Procedure and Evidence³ (hereinafter: “Kenya’s Application”).
3. On 25 September 2015, the Prosecutor filed a request seeking leave to respond to Kenya’s Application in order “to explain the basis of [her] objection” to it.⁴
4. On 29 September 2015, the Appeals Chamber granted the Prosecutor’s request to respond to Kenya’s Application.⁵ The Prosecutor filed her response on 1 October 2015⁶ (hereinafter: “Prosecutor’s Response”). Mr Ruto and Mr Sang were invited to file responses to Kenya’s Application,⁷ which they did on 1 October 2015⁸ (hereinafter: “Mr Ruto’s Response” and “Mr Sang’s Response”, respectively).
5. On 7 October 2015, the Government of the Republic of Uganda (hereinafter: “Uganda”), the Government of the Republic of Namibia (hereinafter: “Namibia”) and the African Union Commission (hereinafter: “African Union”) filed applications for leave to submit observations under rule 103 of the Rules of Procedure and Evidence⁹

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).

³ “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, paras 1, 16.

⁴ “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, para. 4.

⁵ “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)’”, ICC-01/09-01/11-1975 (hereinafter: “Decision of 29 September 2015”), para. 5.

⁶ “Prosecution’s Response 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-01/09-01/11-1977.

⁷ Decision of 29 September 2015, para. 5.

⁸ “Defence 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’”, ICC-01/09-01/11-1978; “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’”, ICC-01/09-01/11-1979.

⁹ “The Government of Uganda Request under Rule 103(1) of the Rules of Procedure and Evidence for Leave to Submit Observations in the Appeal on the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’ (ICC-01/09-01/11-1938-Red, 19 August 2015)”, dated 5 October 2015, ICC-01/09-01/11-1984-Anx, annexed to “Registry transmission of the submissions from the

(hereinafter: “Uganda’s Application”, “Namibia’s Application” and “African Union’s Application”, respectively).

6. On 9 October 2015, the Prosecutor filed a request seeking leave to respond to Uganda’s Application, Namibia’s Application and the African Union’s Application¹⁰ (hereinafter: “Prosecutor’s Request”).

II. SUBMISSIONS

7. Kenya, Uganda, Namibia and the African Union seek leave to make submissions 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.¹¹

8. Kenya, Uganda and Namibia submit that they wish to make observations on the negotiating process leading up to the adoption of the amended rule 68 of the Rules of Procedure and Evidence at the 12th session of the Assembly of States Parties (hereinafter: “ASP”) which, in their view, may be helpful for the proper determination of this appeal.¹² Uganda also seeks leave to present observations on the second and seventh issues that were certified for appeal, namely “[w]hether written statements and transcript of interviews taken in accordance with [r]ules 111 and 112 of the Rules [of Procedure and Evidence] can qualify as ‘prior recorded testimony’ for the purpose of [r]ule 68 (2)(c) and (d), to be admitted for the truth of their content”, and

Government of the Republic of Uganda an ‘Application for leave to file amicus curiae submissions in the case of the Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11’”, ICC-01/09-01/11-1984; “The Government of The Republic of Namibia, Pursuant to Rule 103(1) Request for Leave to Submit Observations as *Amicus Curiae* in the Appeal on the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’ (ICC-01/09-01/11-1938-Corr-Red2, 19 August 2015)”, dated 5 October 2015, ICC-01/09-01/11-1985-Anx, annexed to “Transmission by the Registry of ‘The Government of The Republic of Namibia, Pursuant to Rule 103(1) Request for Leave to Submit Observations as Amicus Curiae in the Appeal on the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’ (ICC-01/09-01/11-1938-Corr-Red2, 19 August 2015)”, ICC-01/09-01/11-1985; “African Union Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence on the Rule 68 Amendments at the Twelfth Session of the ICC Assembly of States Parties” dated 5 October 2015, ICC-01/09-01/11-1983-Anx, annexed to the “Registry Transmission of a submission received from the African Union Commission, represented by Prof. Charles Chernor Jalloh”, ICC-01/09-01/11-1983.

¹⁰ “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’”, ICC-01/09-01/11-1986, paras 2-6.

¹¹ Kenya’s Application, paras 1, 16; Uganda’s Application, para. 3; Namibia’s Application, para. 3; African Union’s Application, para. 17.

¹² Kenya’s Application, paras 7-8, 14; Uganda’s Application, paras 4-6; Namibia’s Application, para. 4.

“[w]hether the Impugned Decision erred in its consideration of ‘interests of justice’ pursuant to [r]ule 68(2)(d) of the Rules”.¹³

9. The African Union wishes to present its observations on the basis of the African Union Assembly of Heads of State and Government’s decision by which it “directed the African Union Commission to seek *amicus curiae* standing before the ICC ‘for purposes of placing before the Court all relevant material arising out of the negotiations’ of [r]ule 68 of the [Rules of Procedure and Evidence] during the Twelfth Session of the [ASP] [...] in November 2013”.¹⁴ Furthermore, the African Union avers that it would “welcome the opportunity to participate” in any oral hearing the Appeals Chamber may convene in the present appeal.¹⁵

10. In her response, the Prosecutor submits that Kenya’s Application should be rejected as “none of the arguments presented [by Kenya in its application] shows that it would be ‘desirable for the proper determination’ of this appeal to hear [Kenya’s] observations”.¹⁶

11. Mr Ruto and Mr Sang support Kenya’s Application.¹⁷ Mr Ruto argues that because Kenya “actively participated in the negotiation and adoption of amended [r]ule 68 at [the 12th Session of the ASP on 27 November 2013]”, it “will be able to provide information regarding what transpired at the ASP in relation to the application of amended [r]ule 68 in this case” which will assist the Appeals Chamber in the determination of this appeal.¹⁸

12. Mr Sang avers that Kenya’s observations may assist 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”.¹⁹

III. MERITS

13. As a preliminary matter, the Appeals Chamber does not consider it necessary to receive a response from the Prosecutor regarding Uganda’s Application, Namibia’s

¹³ Uganda’s Application, paras 3, 9.

¹⁴ African Union’s Application, para. 3.

¹⁵ African Union’s Application, para. 36.

¹⁶ Prosecutor’s Response, paras 3, 17. *See also* Prosecutor’s Response, para. 1.

¹⁷ Mr Ruto’s Response, para. 2; Mr Sang’s Response, paras 3, 10.

¹⁸ Mr Ruto’s Response, para. 4.

¹⁹ Mr Sang’s Response, para. 7.

Application and the African Union's Application. The Prosecutor's Request is therefore rejected.

14. Rule 103 (1) of the Rules of Procedure and Evidence provides as follows:

1. At 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.

2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

15. The Appeals Chamber recalls that its decision pursuant to rule 103 (1) of the Rules of Procedure and Evidence is discretionary.²⁰

16. In the circumstances of the present case, the Appeals Chamber finds that the observations the African Union wishes to make may be desirable for the proper determination of the first issue on appeal, namely, whether the amended rule 68 of the Rules of Procedure and Evidence can be applied in the instant case without offending articles 24 (2) and 51 (4) of the Statute. The Appeals Chamber notes that the receipt of the proposed observations is without prejudice to the weight, if any, to be accorded to them in the determination of this appeal.

17. The Appeals Chamber considers that the observations that Kenya, Uganda and Namibia wish to make in relation to the first issue certified on appeal appear to be duplicative of those that the African Union, of which the three States are members, seek to make. The Appeals Chamber further takes note of the African Union's reference to the decision of the African Union Assembly of Heads of State and Government in relation to the implementation of previous decisions on the Court, in which it directs the African Union to request leave to file *amicus curiae* observations before the Court "for purposes of placing before [it] all the relevant material arising

²⁰ See, *inter alia*, *Prosecutor v. Laurent Koudou Gbagbo*, "Decision on the 'Request for Leave to Submit *Amicus Curiae* Observations pursuant to Rule 103 of the Rules of Procedure and Evidence'", 1 October 2013, ICC-02/11-01/11-517, para. 9; *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. 10.

out of the negotiations” of the amended rule 68 of the Rules of Procedure and Evidence.²¹ In the circumstances described, the Appeals Chamber considers that the submissions that Kenya, Uganda and Namibia seek to make in relation to the first issue certified on appeal would be duplicative of those that the African Union seeks to make.

18. The Appeals Chamber further notes that Uganda requests leave to make observations on the second and seventh issues certified on appeal.²² In particular, the Appeals Chamber observes that Uganda seeks leave to submit observations on how the Trial Chamber interpreted and applied rules 68, 111 and 112 of the Rules of Procedure and Evidence to the facts of the instant case. The Appeals Chamber considers that these observations would not assist it in the determination of the issues on appeal.

19. In light of the foregoing reasons, only the African Union may submit its *amicus curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence by 16h00 on Monday, 19 October 2015.

20. The Prosecutor, Mr Ruto and Mr Sang may respond to observations submitted by the African Union pursuant to rule 103 (2) of the Rules of Procedure and Evidence, by 16h00 on Monday, 26 October 2015.

21. Finally, in the interests of the efficient management of these proceedings, the Appeals Chamber considers it appropriate to set a time limit by 16h00 on Monday, 19 October 2015, for the submission of any further application for leave to make observations on the appeal under rule 103 of the Rules of Procedure and Evidence.

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



Judge Piotr Hofmański
Presiding Judge

²¹ African Union’s Application, para. 3.

²² See Uganda’s Application, para. 3.

Dated this 12th day of October 2015

At The Hague, The Netherlands