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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 with Public Annex

**Prosecution's response to the African Union Commission's *amicus curiae*
submissions pursuant to rule 103**

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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Introduction

1. The Appeals Chamber should reject the submissions of the *amicus curiae*, the Commission of the African Union ("*Amicus*").¹ These submissions repeat, but offer no additional foundation for, the unsupported allegation that the Prosecutor, or another Court official, gave an undertaking that an amended rule 68 would not apply to ongoing proceedings.² Insofar as it relates to her own conduct, or that of her Office, the Prosecutor emphatically denies this allegation,³ which even the *Amicus* concedes to fall below the threshold of "legal certainty".⁴ Nor is it the purpose of an appeal to conduct the kind of factual inquiry proposed, especially with regard to allegations which are wholly unsubstantiated.⁵

2. To the contrary, shortly after the adoption of amended rule 68, the Prosecutor publicly stated that her "actions and decisions are at all times strictly guided by the evidence in accordance with the Rome Statute legal framework," and that her "commitment [...] to the pursuit of justice without fear or favour has remained firm." The Prosecutor specifically assured the people of Kenya that she has and will "continue to do all that [she] can to realise justice for the victims of the 2007-2008 post-election violence."⁶ The Prosecutor stands firm by this commitment.

3. Furthermore, the *Amicus*' arguments are in any event irrelevant for the purpose of this appeal, since they cannot affect the proper interpretation of the Statute and Rules of this Court, or their application to this case. Neither the Prosecutor, nor any other Court official, is empowered to make the kind of undertaking alleged, which

¹ ICC-01/09-01/11-1988 OA10 ("*Amicus* Brief").

² *Contra Amicus* Brief, paras. 11, 52-57, 63.

³ See also ICC-01/09-01/11-1866-Red, para. 17; see also ICC-01/09-01/11-1894-Conf-AnxB.

⁴ *Amicus* Brief, para. 53.

⁵ *Contra Amicus* Brief, paras. 53, 63.

⁶ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following an application seeking an adjournment of the provisional trial date, 19 December 2013, available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-19-12-2013.aspx (accessed 22 October 2015).

would not be enforceable. Nor do the subjective understandings of some States Parties have any force under the established international law of treaties.⁷

Submissions

A) The allegations that the Prosecutor or another Court official gave an undertaking to members of the ASP that amended rule 68 would not apply to ongoing proceedings are unsupported and irrelevant to the interpretation and application of the amended rule

a. The allegation with respect to an undertaking is unsupported

4. There is no evidence of an undertaking by the Prosecutor or another Court official that amended rule 68 would not be apply to pending cases. The *Amicus'* argument in relation to such an undertaking should therefore be dismissed on that basis alone.

5. Neither the *Amicus* nor Mr Sang, who raises the same argument in his Appeal,⁸ provide any factual support for their allegations. The *Amicus* merely refers to three rule 103 applications filed by Kenya, Uganda and Namibia.⁹ However, these applications do not support this allegation.¹⁰ In his Appeal, Mr Sang refers to the Government of Kenya's *amicus curiae* application to the Trial Chamber.¹¹ However, this submission did not raise an allegation of an undertaking. Mr Sang also refers to a letter from the Legal Counsel of the African Union to the Prosecutor. While this letter raises an allegation about an undertaking by "Senior Officials of the Court," it did so

⁷ *Contra Amicus* Brief, paras. 58-63.

⁸ ICC-01/09-01/11-1982-Red ("Sang's Appeal"), paras. 17-19.

⁹ *Amicus* Brief, footnote 60.

¹⁰ See Kenya's application (ICC-01/09-01/11-1972); Uganda's application (ICC-01/09-01/11-1984-Anx); and Namibia's application (ICC-01/09-01/11-1985-Anx).

¹¹ Sang's Appeal, paras. 17-18, footnote 21 (relying on ICC-01/09-01/11-1891, in which Kenya submitted at para. 4 that "during the negotiations, in which the Government actively participated in, some forms of understanding were reached by the Assembly on the implication of the amendment of Rule 68 on the on-going cases before the ICC"). However, Kenya did not raise the allegation that the Prosecutor or another Court official made an undertaking not to apply the amended rule 68 to ongoing trials.

without specifying any details or providing any information or evidence in support of the allegation.¹² In her response, the Prosecutor denied this unfounded allegation and recalled that “the Prosecutor is obliged to apply the plain terms of the Court’s legal framework”.¹³ The Legal Counsel’s letter is similar to letters sent by the Government of Kenya to the President of the ASP and the President of the Court, which the Prosecution had disclosed to the Defence but which have not been relied upon by either the *Amicus* or the Appellant.¹⁴

6. In light of the absence of any evidence, even the *Amicus* concedes that the allegation falls below the threshold of “legal certainty”.¹⁵ He therefore invites the Appeals Chamber to conduct a factual inquiry to “validate” the claim.¹⁶ However, an unsupported rumour that the Prosecutor or another Court official gave an undertaking that amended rule 68 would not apply to pending cases requires no action by the Appeals Chamber. Litigation before this Court should not be based on such unfounded assertions, but on law and evidence. Moreover, it is irrelevant to the resolution of this Appeal whether any undertaking was in fact given. This is so because even if an undertaking had been given, it would not have any legal effect, as explained below.¹⁷ The *Amicus*’ submission should therefore be dismissed.

b. Even if, *arguendo*, an undertaking had been given by the Prosecutor or another Court official, it would not have any legal effect

7. Any alleged undertaking would not impact on the interpretation or application of amended rule 68 because it could not be considered to have been given within the

¹² Sang’s Appeal, footnote 19 (relying on KEN-OTP-0153-0432). *See also* ICC-01/09-01/11-1894-Conf-AnxA. The Legal Counsel of the African Union sent an identical letter to the President of the Court: KEN-OTP-0153-0434.

¹³ ICC-01/09-01/11-1894-Conf-AnxB.

¹⁴ *See* KEN-OTP-0153-0442 and KEN-OTP-0153-0444.

¹⁵ *Amicus* Brief, para. 53.

¹⁶ *Amicus* Brief, paras. 53, 63.

¹⁷ *Prosecutor v. Karadžić*, IT-95-5118-PT, Decision on The Accused’s Holbrooke Agreement Motion, 8 July 2009, available at <http://www.icty.org/x/cases/karadzic/tdec/en/090708.pdf> (accessed 22 October 2015), para. 46.

context of the legislative process. Thus it cannot serve as a source of interpretation of the amended rule pursuant to article 21 of the Statute. In addition, any such undertaking would not bind either the Prosecutor or the Chamber. Therefore, even if such an undertaking existed, *arguendo*, it would be irrelevant as a matter of law and therefore unenforceable.

8. Any alleged undertaking could not be considered as part of the legislative process. Article 51(2) and rule 3 set out the procedure for amendments of the Rules of Procedure and Evidence. According to those provisions, rule amendments are adopted by a two-thirds majority of the members of the Assembly of States Parties (“ASP”). Although the judges acting by an absolute majority or the Prosecutor may propose amendments to the Rules,¹⁸ they have no role in the negotiations by the members of the ASP which lead to the adoption of a new rule. Moreover, statements by the Prosecutor or any other Court officials to individual members of the ASP have no legal relevance. According to the Rules of Procedure of the ASP, any communications by the Prosecutor or other Court officials to the ASP must either be directed to the ASP as a whole or to its Bureau.¹⁹

9. Accordingly, any alleged undertaking by the Prosecutor or another Court official to a member of the ASP during the drafting process would have no legal effect. Such an undertaking would have been outside the mandate and powers of the relevant Court official under the Statute, and as such would be considered null and void for all intents and purposes. In fact, what the *Amicus* portrays as an “undertaking” would be nothing more than a personal opinion expressed by a Court official, unrelated to his or her official functions. It could not bind the Court or its organs in the interpretation and application of an amendment to a rule.

¹⁸ Article 51(2); rule 3(1). In addition, the Advisory Committee on Legal Texts “shall consider and report on proposals for amendments to the Rules [...]”: see Regulations of the Court, regulation 4(4).

¹⁹ Rules of Procedure of the Assembly of States Parties, ICC-ASP/1/3, paras. 34 and 47.

10. In the context of a criminal prosecution, the application of the law to a particular case is not a negotiable matter. A court's power to decide on a criminal matter is defined by law rather than the parties to the proceedings.²⁰ Therefore, the Prosecutor or another Court official could not have bound the Court through an undertaking not to apply amended rule 68 to a particular case. While negotiations as to the application of the law may be possible in contract law, any analogy to that effect in criminal law is inapposite.²¹

11. The *Amicus* nevertheless argues that a Court official acting with "full powers" can bind the Court pursuant to the 1986 *Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations*.²² However, the 1986 VCLT does not apply to the Rome Statute, which is a treaty between States only. The Court is not a party to the Rome Statute, but rather its object.²³ The Appeals Chamber has repeatedly held that the interpretation of the Rome Statute is governed by the 1969 *Vienna Convention on the Law of Treaties*.²⁴

12. The two examples from the jurisprudence of the International Court of Justice adduced by the *Amicus* are inapposite. They deal with the legal consequences arising from statements made by representatives of States who were parties to a negotiation and not to statements by third parties (such as the Prosecutor or another Court official), who have no role in the legislative process.²⁵

²⁰ *Prosecutor v. Karadžić*, IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber's Decision on alleged Holbrooke agreement, 12 October 2009, available at <http://www.icty.org/x/cases/karadzic/acdec/en/091012.pdf> (accessed 22 October 2015) ("Karadžić Appeals Decision"), para. 38.

²¹ *Karadžić Appeals Decision*, para. 38.

²² ("1986 VCLT"); *Amicus Brief*, paras. 56-57.

²³ Rome Statute, Preamble.

²⁴ ("1969 VCLT"); ICC-01/04-168 OA3, para. 33; ICC-01/04-01/07-573 OA6, para. 5.

²⁵ *Amicus Brief*, footnotes 61 and 65. See *Nuclear Tests (Australia v. France)*, Judgement, I.C.J. Reports 1974, available at <http://www.icj-cij.org/docket/files/58/6093.pdf> (accessed 22 October 2015) ("*Nuclear Tests*"), para. 48 ("The Court [...] cannot in this respect be bound by the view expressed by another State which is in no way party to the text", emphasis added); *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, available at <http://www.icj-cij.org/docket/files/126/10435.pdf> (accessed 22 October 2015), para. 47 ("Persons representing a State in

13. Further, because any such undertaking is alleged to have been given by an official who was not a party to the negotiations, it does not form part of the *travaux préparatoires* and therefore cannot inform the Appeals Chamber's interpretation of amended rule 68. In any event, because the interpretation of amended rule 68 does not leave its meaning ambiguous or obscure and would not lead to manifestly absurd or unreasonable results, it is unnecessary for the Appeals Chamber to consider the drafting history of amended rule 68.²⁶

14. Even if the alleged undertaking had led some members of the ASP to believe that the rule amendment would not be applied to pending cases, and thereby motivated some hitherto hesitant ASP members to support the rule amendment,²⁷ this would be irrelevant for the Court's interpretation of amended rule 68 in this or other cases.²⁸

B) The understanding expressed by three African States Parties regarding the amended rule's non-retroactivity is irrelevant to the interpretation and application of amended rule 68 in the case against Messrs Ruto and Sang

15. Contrary to the contention of the *Amicus*,²⁹ the statements expressed by three African States Parties (Kenya, Nigeria and South Africa) at the ASP on the day of the adoption of amended rule 68 cannot be considered as "interpretative declarations" on the basis that other members of the ASP did not object to them. Accordingly they

specific fields may be authorized by that *State* to bind it by their statements in respect of matters *falling within its purview*", emphasis added).

²⁶ 1969 VCLT, article 32. ICC-01/04-168 OA3, 13 July 2006, para. 40 ("The Appeals Chamber has held that when "a matter is exhaustively dealt with by its text or that of the Rules of Procedure and Evidence [...] no room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject"); ICC-01/04-01/06-772 OA4, para. 34; ICC-01/04-168 OA3, paras. 22-24, 33-42. *See also* "Prosecution's Consolidated Response to the Appeals of Mr Ruto and Mr Sang against the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'" ("Prosecution Response"), para. 26.

²⁷ *Amicus* Brief, para. 11.

²⁸ The Trial Chamber correctly held that the views of a limited number of States Parties cannot be privileged over the collective will of the ASP reflected in the resolution amending Rule 68: ICC-01/09-01/11-1938-Red ("Decision"), para. 18.

²⁹ *Amicus* Brief, paras. 58-63.

do not form part of the “context” which article 31 of the 1969 VCLT states must be taken into consideration to interpret treaty provisions. Instead, these statements are irrelevant for the interpretation of amended rule 68 and its application in the case against Messrs Ruto and Sang.

16. First, the *Amicus* conflates the procedure for reservations,³⁰ with that of interpretative declarations, and incorrectly imports the principles regarding objections based on the former³¹ into the latter. The fact that no member of the ASP objected to the statements expressed by Kenya, Nigeria and South Africa is inconsequential and does not reflect the understanding by the majority of the members of the ASP of amended rule 68 and how it would be interpreted by the Court.³² In any event, the *Amicus*’ arguments are inapposite because the applicable law regarding both reservations and interpretative declarations regulates the legal effect of certain treaty provisions *vis-à-vis* the reserving or declaring state only. Reservations and interpretative declarations do not affect the interpretation and application of a multilateral treaty with respect to its members in general.³³ Moreover, amended rule 68 does not concern the rights and obligations of States under the Rome Statute, but relates to the applicable law and procedure in criminal proceedings against individuals who are accused before the Court.³⁴ Under the Rome Statute framework, States Parties have no legitimate legal interest *vis-à-vis* individual prosecutions before the Court, as explained below. Pursuant to articles 21(3) and 27(1) of the Statute, the law (including amended rule 68) shall apply equally to all persons without any distinction.

³⁰ 1969 VCLT, article 2(d) (“‘Reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”).

³¹ 1969 VCLT, articles 19-23.

³² See Decision, para. 18.

³³ *Nuclear Tests*, paras. 42-46; see also International Law Commission, *Guiding Principles applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with commentaries thereto*, Official Records of the General Assembly, 61st session, Supplement No.10 (A/61/10) available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf (accessed 22 October 2015), Guiding Principle 9.

³⁴ In the context of the Rome Statute, interpretative declarations may at most be possible in relation to those provisions that create duties for States, such as the provisions under Part 9 of the Statute.

17. Second, the statements made by Kenya, Nigeria and South Africa add nothing new to the interpretation of amended rule 68 and therefore have no impact on its interpretation. These three statements merely indicated that the relevant States understood amended rule 68 would not be applied *retroactively* in any ongoing trials to the detriment of the accused.³⁵ This is consistent with the language included in the text of amended rule 68, the preamble to the ASP resolution which adopted the rule amendment³⁶ and article 51(4) of the Statute.³⁷ In its Decision, the Trial Chamber acknowledged that amended rule 68 cannot be applied retroactively to the detriment of the accused and ensured that it was not so applied in this case.³⁸ The *Amicus* disagrees with the Trial Chamber's findings, but does not demonstrate any error in the Trial Chamber's Decision.³⁹

18. Third, the statements expressed by Kenya, Nigeria and South Africa cannot be interpreted as relating to the application of amended rule 68 to pending cases. This would be inconsistent with the Court's independence and the Trial Chamber's prerogative to apply the law to the facts of a case. Any such declaration by a State Party would exceed the State's legislative function and would interfere with the judicial functions of the Court. As a result, such a statement would be *ultra vires* the Rome Statute and would be void of any legal effect.

19. The *Amicus'* arguments regarding the statements of the three States Parties and their alleged impact on the interpretation and application of amended rule 68 to this case should therefore be rejected.

³⁵ *Amicus* Brief, paras. 59-61.

³⁶ Resolution ICC-ASP/12/Res.7, operative paragraph 2.

³⁷ Because the three statements are fully consistent with the text of the Preamble of the Resolution which adopted amended rule 68, and with article 51(4), no objection or acceptance by any other State Party was needed to confirm the meaning of amended rule 68.

³⁸ Decision, paras. 20-27.

³⁹ See also Prosecution Response.

C) Other arguments contained in the *Amicus* Brief.

- a. The admission of the prior recorded testimony of the witnesses pursuant to amended rule 68 serves the purpose of the rule amendment

20. Contrary to the contention of the *Amicus*,⁴⁰ the Trial Chamber's application of amended rule 68 in this case does serve the purpose for which draft amendment to rule 68 was initially designed by the Working Group on Lessons Learnt ("WGLL")—namely, to streamline the presentation of evidence and to deter witness interference.⁴¹ The Trial Chamber expressly acknowledged the functions of amended rule 68 to enhance the expeditiousness and efficiency of the proceedings and to permit the submission of the evidence of witnesses who have been subject to interference,⁴² and applied the rule accordingly.⁴³ The *Amicus* simply disagrees with the Trial Chamber's Decision but fails to identify an error.

21. In addition, if the *Amicus'* submissions were adopted, no evidence could ever be admitted pursuant to amended rule 68(2)(d), as this would frequently increase the length of the proceedings, at least in cases where prior recorded testimony is admitted in relation to a witness who has recanted his prior evidence in his in-court testimony.⁴⁴ Further, the *Amicus'* argument about deterrence, namely that the admission of evidence under amended rule 68(2)(d) cannot deter past conduct,⁴⁵ is a purely hypothetical argument and unrelated to this case. The Trial Chamber admitted the prior recorded testimony of the five witnesses having concluded, among other things, that they had failed to attend or, having attended, had failed to give evidence with respect to a material aspect included in their prior recorded testimony, and that this failure had been materially influenced by improper

⁴⁰ *Amicus* Brief, paras. 6, 9-10, 14-22.

⁴¹ ICC-ASP/12/37/Add.1, paras. 8, 34.

⁴² Decision, para. 20.

⁴³ See e.g. Decision, paras. 32, 60.

⁴⁴ *Amicus* Brief, paras. 15-19, especially paras. 17-18.

⁴⁵ *Amicus* Brief, paras. 20-22.

interference.⁴⁶ This finding implies that the witness interference, even if it commenced prior to the rule amendment, continued—at least in its effect—until the date when the Decision was rendered.

22. In any event, even if amended rule 68 was initially meant for a particular purpose, this does not limit the Trial Chamber in applying the provision. Amended rule 68 must be read in accordance with the Statute.⁴⁷ Therefore, the Trial Chamber may apply amended rule 68 as it deems appropriate, as long as it ensures that its application is consistent with the fair and expeditious conduct of the proceedings and that the rights of the Accused are fully respected.⁴⁸

b. The *Amicus*' arguments on the interpretation of articles 24(2) and 51(4) repeat the Appellants' arguments that are addressed in the Prosecution's response to the Appeals

23. The *Amicus* also raises a number of additional arguments that concern (a) the application of the law more favourable to the Accused, pursuant to article 24(2);⁴⁹ and (b) the prohibition under article 51(4) against applying amended rule 68 retroactively⁵⁰ and to the detriment of the Accused.⁵¹ These arguments merely repeat submissions made by the Appellants.⁵² The Prosecution refers the Appeals Chamber to the relevant portions of its consolidated response to the Appeals of Messrs Ruto and Sang⁵³ and will not repeat its submissions on these matters in this document.

⁴⁶ Rule 68(2)(d)(i).

⁴⁷ Rules of Procedure and Evidence, Preamble.

⁴⁸ Article 64(2).

⁴⁹ *Amicus* Brief, paras. 23-31.

⁵⁰ *Amicus* Brief, paras. 32-37.

⁵¹ *Amicus* Brief, paras. 38-51.

⁵² See ICC-01/09-01/11-1981-Red ("Ruto Appeal"); Sang Appeal.

⁵³ See Prosecution Response, paras. 14-22 (on the application of the law more favourable to the Accused, pursuant to article 24(2)); paras. 39-54 (on the prohibition under article 51(4) to apply the amended rule 68 retroactively) 55-87 (on the prohibition under article 51(4) to apply the amended rule 68 to the detriment of the Accused).

Conclusion

24. For the reasons set out above, the arguments put forward in the *Amicus* Brief should be rejected.



Fatou Bensouda, Prosecutor

Dated this 26th day of October 2015
At The Hague, The Netherlands

Word Count: 3,688⁵⁴

⁵⁴ The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.