

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/09-01/11 OA 7 OA 8

Date: 10 June 2014

THE APPEALS CHAMBER

Before:

**Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Erkki Kourula
Judge Anita Ušacka**

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 Republic of Kenya's request for leave to make observations
under 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 Mr William Samoei Ruto
Mr Karim A. A. Khan
Mr David Hooper

Counsel for Mr Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) entitled “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation” of 17 April 2014 (ICC-01/09-01/11-1274-Corr2),

Having before it the “The Government of the Republic of Kenya’s Request to File Amicus Submissions in the Appeal against the Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation” of 3 June 2014 (ICC-01/09-01/11-1333),

Renders, pursuant to rule 103 (1) of the Rules of Procedure and Evidence, the following

DECISION

1. The above-mentioned request is granted.
2. The Government of the Republic of Kenya may file its amicus observations pursuant to rule 103 (1) of the Rules of Procedure and Evidence, which should not exceed ten pages, by 16h00 on Wednesday, 25 June 2014.
3. All parties in the present proceedings may file a response to the Republic of Kenya’s amicus observations, which shall not exceed ten pages each, by 16h00 on Monday, 30 June 2014.
4. The Prosecutor’s request for a fifteen-page extension for her consolidated response to the present appeals is dismissed.

REASONS

I. PROCEDURAL HISTORY

1. On 23 May 2014, 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 Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”² of 17 April 2014 (hereinafter: “The Impugned Decision”) in relation to the following two issues:

- i. Whether a chamber has the power to compel the testimony of witnesses (‘First Issue’);
- ii. Whether the Government of Kenya, a State party to the Rome Statute, is under an obligation to cooperate with the court to serve summonses and assist in compelling the appearance of witnesses subject to a subpoena (‘Second Issue’).³

2. Furthermore, in its Decision Granting Leave to Appeal, the Trial Chamber granted the application of the Government of the Republic of Kenya (hereinafter: “Kenya”) to submit *amicus curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence for the purposes of that decision.⁴ Kenya had already filed its substantive observations as part of its request for leave to file such observations and the Trial Chamber exceptionally accepted them.⁵

3. On 3 June 2014, Kenya filed “The Government of the Republic of Kenya’s Request to File Amicus Submissions in the Appeal against the Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”⁶ (hereinafter: “Kenya’s Request for Leave to File Amicus Observations”), requesting to leave to file amicus observations on the second certified issue.⁷ Kenya submits that it already participated substantially in the trial proceedings that formed the basis for the Impugned Decision,⁸ and that its participation is

¹ “Decision on defence applications for leave to appeal the ‘Decision on the Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’ and the request of the Government of Kenya to submit *amicus curiae* observations”, ICC-01/09-01/11-1313 (hereinafter: “Decision Granting Leave to Appeal”).

² ICC-01/09-01/11-1274-Corr2.

³ Decision Granting Leave to Appeal, paras 40, 54.

⁴ Decision Granting Leave to Appeal, paras 34.

⁵ Decision Granting Leave to Appeal, para. 35, referring 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 Applications by the Ruto and Sang Defence Teams for Leave to Appeal the Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”, 12 May 2014, ICC-01/09-01/11-1304, paras 19-24.

⁶ ICC-01/09-01/11-1333.

⁷ Kenya’s Request for Leave to File Amicus Observations, paras 2, 3, 5, 8.

⁸ Kenya’s Request for Leave to File Amicus Observations, paras 3, 5.

indispensable to a successful cooperation.⁹ Kenya further submits that this is the first time the Court requested the cooperation of the State Party in compelling witness testimony, adding that the Appeals Chamber already found that where a novel issue is at hand, States Parties should be heard *via amici* observations.¹⁰ Kenya requests to be given five days from the date of the filing of Mr Ruto and Mr Sang's respective documents in support of their appeals to file its amicus observations.¹¹

4. On 4 June 2014, the Appeals Chamber issued the "Order for responses to the Republic of Kenya's request for leave to make observations under rule 103 of the Rules of Procedure and Evidence",¹² by which it allowed all parties to respond to Kenya's Request for Leave to File Amicus Observations by 5 June 2014.

5. On 5 June 2014, all parties filed a response to the Kenya's Request for Leave to File Amicus Observations, submitting that the Appeals Chamber should grant the request,¹³ because the second certified issue questions the obligation of State Parties to cooperate with the Court for the purpose of witness summonses.¹⁴ Furthermore, Mr Ruto underlined that Kenya's amicus observations would not delay the present appeals proceedings, considering the five-day time limit proposed by Kenya.¹⁵ Should the Appeals Chamber grant leave to Kenya to file amicus observations, the Prosecutor proposes to respond to such observations in her consolidated response to the appeals at hand, which would, in her view, provide further good cause for her request for an extension of time, and would justify an additional extension of the page limit to that already granted to her by the Appeals Chamber.¹⁶ The Prosecutor also submits that Mr

⁹ Kenya's Request for Leave to File Amicus Observations, para. 5.

¹⁰ Kenya's Request for Leave to File Amicus Observations, para. 6, referring to *Prosecutor v. Ruto and Sang*, "Decision on the requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence", 13 September 2013, ICC-01/09-01/11-942 (OA 5).

¹¹ Kenya's Request for Leave to File Amicus Observations, para. 7.

¹² ICC-01/09-01/11-1338.

¹³ "Defence response to the 'Government of the Republic of Kenya's Request to File Amicus Submissions in the Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", ICC-01/09-01/11-1339, (hereinafter: Mr Ruto's Response"); "Sang Defence response to the Government of the Republic of Kenya's request to file amicus submissions in the appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State party cooperation", ICC-01/09-01/11-1341, (hereinafter: Mr Sang's Response"); and "Prosecution Response to the Government of the Republic of Kenya's Request to File Amicus Submissions in the Appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1342, , (hereinafter: the "Prosecutor's Response").

¹⁴ Mr Ruto's Response, para. 3; Mr Sang's Response, para. 3, and Prosecutor's Response, para. 3.

¹⁵ Mr Ruto's Response, para. 4.

¹⁶ Prosecutor's Response, para.4.

Ruto and Mr Sang should respond to Kenya's amicus observations on the same day as she has to file her consolidated response to the appeals.¹⁷

6. On the same day, Mr Sang and Mr Ruto, having been granted an extension of the page limit,¹⁸ filed their respective documents in support of their appeals.¹⁹ According to the Appeals Chamber's decision of 5 June 2014,²⁰ the filing of the Prosecutor's consolidated response thereto is due on Friday, 20 June 2014.

II. MERITS

7. The Appeals Chamber recalls that its decision pursuant to rule 103 (1) of the Rules of Procedure and Evidence is discretionary. In the application under consideration, the Appeals Chamber notes that all parties agree that Kenya's Request for Leave to File Amicus Observations should be granted.²¹ In light of the second certified issue, the Appeals Chamber finds that Kenya's amicus observations are desirable for the proper determination of the specific question of whether a State Party to the Rome Statute, is under an obligation to cooperate with the Court to serve summonses and assist in compelling the appearance of witnesses subject to a subpoena. Thus, in accordance with rule 103 (1) of the Rules of Procedure and Evidence, Kenya's Request for Leave to File Amicus Observations is granted.

8. The Appeals Chamber however notes that Kenya already made several substantial submissions before the Trial Chamber in relation to the issue at hand and recalls that these submissions are thus already before the Appeals Chamber.²²

¹⁷ Prosecutor's Response, para.5.

¹⁸ "Decision on requests of Mr William Samoei Ruto and Mr Joshua Arap Sang for extension of page limit for their documents in support of the appeal", 3 June 2014, ICC-01/09-01/11-1335, by which the Appeals Chamber extended the page limits for the documents in support of the appeals of Mr Ruto and Mr Sang by five pages and by which it granted leave to the Prosecutor to file a consolidated response to the documents in support of the appeals of no more than 45 pages.

¹⁹ "Defence appeal against the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", ICC-01/09-01/11-1345, (hereinafter: "Mr Ruto's Document in Support of his Appeal"); and "Sang Defence appeal against the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1344 (hereinafter: "Mr Sang's Document in Support of his Appeal").

²⁰ "Decision on the request of the Prosecutor for an extension of the time limit for her consolidated response to the documents in support of the appeals", ICC-01/09-01/11-1346.

²¹ Mr Ruto's Response, para. 3; Mr Sang's Response, para. 3, and Prosecutor's Response, para. 3.

²² "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 Applications by the Ruto and Sang Defence Teams for Leave to Appeal the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 12 May 2014, ICC-01/09-01/11-1304, paras 19-24; See also "The Government of the Republic of Kenya's Submissions on the 'Prosecution's Request under Article 64 (4) (b) and Article 93 to Summon Witnesses'", 10 February

Furthermore, recalling the Appeals Chamber's requirement that the arguments be presented in a concise and focussed manner²³ and the fact that the amicus observations shall relate to the second issue only, it finds that the amicus observations by Kenya should not exceed ten pages, the same applying to the parties' responses thereto. Indeed, the Appeals Chamber expects the parties' responses to focus specifically on the amicus observations filed by the Government of Kenya rather than using their respective ten pages to reply to each other.

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



Judge Akua Kuenyehia
Presiding Judge

Dated this 10th June 2014

At The Hague, The Netherlands

2014, ICC-01/09-01/11-1184; and ICC-01/09-01/11-T-86-Red-ENG WT, Transcripts of 14 February 2014.

²³ "Decision on requests of Mr William Samoei Ruto and Mr Joshua Arap Sang for extension of page limit for their documents in support of the appeal", 3 June 2014, ICC-01/09-01/11-1335, para. 5.