

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 12 May 2014

**TRIAL CHAMBER V(A)**

Before: Judge Chile Eboe-Osuji, Presiding  
Judge Olga Herrera Carbuccion  
Judge Robert Fremr

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF**

***THE PROSECUTOR v. WILLIAM SAMOEI RUTO  
AND JOSHUA ARAP SANG***

**Public**

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

Source: The Government of the Republic of Kenya,  
represented by the Attorney General of Kenya

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

**The Office of the Prosecutor**

Ms Fatou Bensouda, Prosecutor  
Mr James Stewart  
Mr Anton Steynberg

**Counsel for William Ruto**

Mr Karim Khan QC  
Mr David Hooper QC  
Mr Essa Faal  
Ms Shyamala Alagendra

**Counsel for Joshua Sang**

Mr Joseph Kipchumba Kigen-Katwa  
Ms Caroline Buisman

**Legal Representatives of the Victims**

Mr Wilfred Nderitu

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**Office of Public Counsel for Victims**

Mr Orchlon Narantsetseg

**Office of Public Counsel for Defence**

**States' Representatives**

Mr Githu Muigai, SC  
Attorney General, Republic of Kenya

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Patrick Craig

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. On 17 April 2014, the majority of Trial Chamber V(A) determined that eight witnesses said to reside in Kenya may be summoned to testify at the ICC and that they must be compelled to do so by the Government of the Republic of Kenya ("Government" or "GOK");<sup>1</sup> Justice Carbuccia filed a dissent to the effect that although a summons may be issued, the Government of Kenya could not be required to compel them to appear.<sup>2</sup>
2. In the Decision, the majority of the Chamber, *inter alia*:

'REQUESTS the assistance of the Government of Kenya in ensuring the appearance of the witnesses as indicated above [Witness 15, Witness 16, Witness 336, Witness 397, Witness 516, Witness 524, Witness 495, and Witness 323], using all means available under the laws of Kenya; the requested and required assistance shall include, but is not limited to the following:

- (i) to communicate to the concerned witnesses the Chamber's requirement of their attendance as indicated above;
- (ii) to facilitate, by way of compulsory measure as necessary, the appearance of the indicated witnesses for testimony before the Trial Chamber by video-link or at a location in Kenya and on such dates and times as the Prosecutor or the Registrar (as the case may be) shall indicate;
- (iii) to make appropriate arrangements for the security of the indicated witnesses until they appear and complete their testimonies before the Chamber;

DIRECTS the Registry to prepare and transmit, in consultation with the Prosecutor, the necessary subpoenas to the concerned witnesses (with or without the assistance of the Government of Kenya) as well as the necessary cooperation request to the relevant authorities of the Republic of Kenya in accordance with

<sup>1</sup>*Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1274-Corr2, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014 ("Decision").

<sup>2</sup>*Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1274-Anx, Dissenting Opinion of Judge Herrera Carbuccia on the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation', 29 April 2014 ("Dissent").



articles 93(l)(d), 93(1)(1), 96 and 99(1) of the Statute, in accordance with this decision;<sup>3</sup>

3. On 25 April 2014, the Government filed a request to be formally notified of the Decision and the Dissent and requested an extension of time to either file its own leave to appeal or to make amicus submissions pursuant to Rule 103(1).<sup>4</sup> Though the Prosecution opposed this request,<sup>5</sup> the Trial Chamber exceptionally extended to 12 May 2014 the deadline for the Government to file.<sup>6</sup> The Trial Chamber determined:

Having been granted an extension of time, it is up Government of Kenya to use that time to make any application they find it appropriate to make (either as to their own leave to appeal or, alternatively, as to leave to join as amicus curiae to any other request for leave to appeal), without prejudice to the Chamber's decision at the appropriate time on any such application to be made by Government of Kenya, when the occasion is ripe. The Chamber will rule upon any eventual application in due course.<sup>7</sup>

4. While the Government maintains that it has the right to directly file its own request for leave to appeal the majority's decision pursuant to Article 82(1)(d), it has determined that in this case, it is sufficient and most appropriate for the Government to seek leave as *amicus curiae*, in accordance with Rule 103(1), to join the applications for leave to appeal filed separately by the Defence for Mr. William Samoei Ruto<sup>8</sup> and the Defence for Mr. Joshua arap Sang<sup>9</sup> on 5 May

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<sup>3</sup>Decision, pg. 77.

<sup>4</sup>*Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1277, The Government of the Republic of Kenya's Request for an Extension of Time and/or Leave to Seek Leave to Appeal the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 25 April 2014.

<sup>5</sup>*Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1284, Prosecution's Response to the Government of the Republic of Kenya's Request for an Extension of Time and/or Leave to Appeal the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 2 May 2014.

<sup>6</sup>*Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1287, Urgent Decision on Government of the Republic of Kenya's Request for an extension of deadline to file leave to appeal and/or leave to submit amicus curiae observations on the Decision on the summon of witnesses, 2 May 2014.

<sup>7</sup>*Ibid*, para. 8.

<sup>8</sup>*Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1291, Defence application for leave to appeal the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 5 May 2014 ("Ruto LTA Application").

2014, and make observations that would assist the Chamber to better appreciate the some issues of concern arising from the Trial Chamber's decision.

5. In particular, through this *amicus* submission, the Government seeks to provide:
  - i. preliminary observations as to its understanding and position in relation to the Decision; and
  - ii. substantive observations on the merit of the issues identified by the Defence for leave to appeal, and the impact that these issues on the administration of law in the Republic of Kenya.

## II. PRELIMINARY OBSERVATIONS ON THE DECISION

6. The Government of Kenya reiterates its long-standing commitment to cooperate with the International Criminal Court ("ICC") in fulfilling its obligations as a State Party to the Rome Statute, while acting in conformity with its national law. The fact that the Government has filed this application for *amicus* with respect to the applications for leave to appeal the Decision should not be construed as an indication of obstruction or non-compliance. Rather, the Government of Kenya has serious concerns about how the Chamber analysed the relevant legal instruments under international and domestic law and how the laws were ultimately found to coalesce into binding the GOK as a State Party to compel witnesses to testify - against their will and on the threat of sanction - in the proceedings at the ICC.
7. The Government accepts the finding by the majority of the Trial Chamber that the ICC may have the power to issue summons for witnesses who are willing

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<sup>9</sup>*Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1293, Sang Defence Request for Leave to Appeal the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 5 May 2014 ("Sang LTA Application").



to appear voluntarily. Therefore, the GOK awaits the necessary cooperation request from the Registry, which must be effected in accordance with Articles 93(1)(d), 93(1)(l), 96 and 99(1) of the Statute. The Government assumes that the cooperation request will identify the witnesses concerned and will indicate, as far as possible, the likely whereabouts of each of the witnesses in Kenya. This information is necessary in order to facilitate the efficient service of the subpoenas, and to ascertain whether, at this time, any of the witnesses are willing to appear voluntarily.

8. Indeed, the Government pledges that as a State Party, it will do its utmost to locate and serve the eight witnesses, once they become known to it. Thereafter, any witness who is found and served and who indicates that he/she is now, in light of the subpoena or otherwise, ready and willing to testify, will be availed to the Court without delay (whether for transport to The Hague, testimony via video-link, or for proceedings at an agreed location in Kenya).
9. However, the Government takes concern with those aspects of the Decision that created on it an obligation to compel unwilling witnesses to appear and give their testimonies before the Court.
10. Further, the Government notes that the Chamber requires the Government to "make appropriate arrangements for the security of the indicated witnesses".<sup>10</sup> Of course, the Government's standard position is that anyone associated with a judicial process, including witnesses, should be secure and should not be interfered with in any manner.

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<sup>10</sup>Decision, p. 78. Though the Government also notes that the protection of witnesses is the responsibility of the Trial Chamber pursuant to Article 68(1), which states, in part, that "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses". See also, Sang Defence LTA, para. 3(vi).

11. In this instance, the Government does not see any particular justification for the request by the Chamber to make special arrangements for the security of these eight witnesses. Domestically, witnesses who may need to be part of Kenya's witness protection program are subjected to an individualized threat assessment before any such undertaking can be given. The Government notes that some of the witnesses (for instance Witness 15 and Witness 16) have seemingly gone public regarding their prior participation with and withdrawal from the ICC process, and to the Government's knowledge, they have not laboured under any security risks since that time. However, and in consultation with the eight witnesses, the Government pledges to take measures as necessary to ensure their safety and security.
12. Lastly, it is understood that suspensive effect in respect of the Decision may only be granted by the Appeals Chamber, if and when leave to appeal is granted.<sup>11</sup> However, the Government deems that it would be prudent for the Registry to hold off on requesting the assistance of the Government in serving the summons, at least until the question of leave to appeal, as made out in the applications of the Defence teams of Mr. Ruto and Mr. Sang, has been determined by the Trial Chamber.

### III. APPLICABLE LAW

13. Article 82(1)(d) states that either Party may appeal: "A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the

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<sup>11</sup>**Article 82(3):** An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence; and **Rule 156(5):** When filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3.

Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".<sup>12</sup>

14. Rule 103(1) provides: "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."

#### IV. SUBSTANTIVE OBSERVATIONS RE LEAVE TO APPEAL

##### *The Government's Observations should be accepted pursuant to Rule 103(1)*

15. The Government of Kenya submits that it is desirable for the Trial Chamber to entertain the observations submitted herein since the Government participated substantively in both the written and oral proceedings that formed the basis for the majority's Decision. In addition, the assistance and cooperation of the Government of Kenya is essential, indeed critical and indispensable, to the successful implementation of the Decision, should it stand. Therefore, it is only fair that the Government be provided an exhaustive opportunity to dialogue with the Court through formal pleadings such as this, in order to arrive at a just conclusion which takes into account the Court's responsibilities to search for the truth and the State's responsibilities to uphold the Rome Statute in accordance within its national constitutional and legal framework.
16. Significantly, the Appeals Chamber in this case has determined that where there is a "novel" issue needing resolution, it is desirable to hear from States

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<sup>12</sup>See also, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-817, Decision on Prosecution's Application for Leave to Appeal the 'Decision on MrRuto's Request for Excusal from Continuous Presence at Trial', 18 July 2013, para. 14; ICC-01/09-01/11-596, Decision on the joint defence request for leave to appeal the decision on witness preparation, 11 February 2013, para. 4.



Parties through *amici curiae* observations. Previously, the novel issue was in relation to whether Mr. William Ruto could be excused from portions of his trial in order to better fulfil his constitutional duties as Deputy President of the Republic of Kenya.<sup>13</sup> That issue impacted on the interests of States Parties in much the same way as the current issue of obligating a State to compel witnesses to attend the trial and give testimony does. This issue is novel in the sense that the ICC has never before requested the cooperation of a State Party in compelling witness testimony. Therefore, it is also desirable to hear from a State Party in relation to the novel issue arising from this Decision.

17. Furthermore, the Government of Kenya is best placed to explain to the Court how questions of fairness and expeditiousness play out in the national Kenyan context and legal system.
18. For these reasons, the Government submits that the Trial Chamber should accept these *amicus curiae* observations pursuant to Rule 103(1).

*The Issues Arise from the Decision and Merit Leave to Appeal*

19. The Government agrees that the issues identified by the Defence in their respective applications arise from the decision and merit leave to appeal. There is a significant amount of convergence in the three issues identified for appeal by the Ruto Defence<sup>14</sup> and the six issues identified by the Sang Defence<sup>15</sup>. For this application, the Government focuses on those issues which

<sup>13</sup>The Appeals Chamber granted the requests of the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda to file *amici curiae* observations in respect of the Excusal Decision. *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-942 OA5, Decision on the requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence, 13 September 2013.

<sup>14</sup>Ruto Defence LTA, para. 6.

<sup>15</sup>Sang Defence LTA, para. 3.

impact either the majority's determination of national Kenyan law, or the imposition of obligations on the Government of Kenya, namely:

- i. Whether the Chamber can interpret the Republic of Kenya's domestic law and determine that it allows it to compel witnesses to testify before the ICC and to sanction them for non-compliance;<sup>16</sup>
- ii. Whether the Court could rely on implied powers to circumvent the express provisions of Article 93(1)(e) in ordering the Government of Kenya to compel witnesses' attendance before the Court;<sup>17</sup>
- iii. Whether the Government of Kenya was required to show that its domestic laws prohibited the enforcement of an ICC summons.<sup>18</sup>

Fair and Expeditious Conduct of the Trial

20. The question of fairness of the proceedings arises not just with respect to the parties and the participants in the trial, but to all those impacted by the decisions of the Court. Here, the Government will focus its observations on the fairness of the Decision vis-à-vis the eight witnesses (whom are seemingly Kenyan citizens) and vis-à-vis the Government of Kenya itself as a State Party.
21. The Government is not aware of the circumstances under which the eight witnesses initially chose to cooperate with the Prosecution and to provide witness statements. However, it is easily surmised that the witnesses assumed that their participation in the ICC process was voluntary, and that simply giving a statement to ICC investigators was not automatically binding them to testify at trial at a later date. All of the other commissions and inquiries into post-election violence in Kenya were voluntary processes; for instance, providing a statement to investigators of CIPEV or KNCHR or HRW did not bind the witnesses in any way or compel their participation in future

<sup>16</sup>See, Ruto Defence LTA, para. 3(i); Sang Defence LTA, paras.3(ii) and 3(iv).

<sup>17</sup>See, Ruto Defence LTA, para. 3(ii); Sang Defence LTA, para.3(i)(b).

<sup>18</sup>See, Ruto Defence LTA, para. 3(iii); Sang Defence LTA, para. 3(iii)

proceedings. Therefore, and absent any obvious and clear indication to the contrary, these witnesses likely assumed that the same circumstances applied to their preliminary participation with the ICC. At no part in the submissions of the Prosecution, nor in the Decision of the majority, can the Government ascertain where the Prosecution or the Court ever informed the witnesses that failure to follow-up their statement-giving with live in-court testimony would subject them to criminal sanction and penalty in a Kenyan court. It is now the height of unfairness to retroactively impose a punishment upon them for such "offenses", where the witnesses have indicated that they have withdrawn their cooperation with the process.<sup>19</sup> Indeed, to do so is contrary to Kenyan law.

22. Additionally, the Decision places the Government of Kenya as a State Party, in that it interprets the plain language of the Statute in a way that was not anticipated by the signatories. When Kenya signed the Rome Statute, there was nothing in the terms of the treaty that put the State on notice that one of the forms of assistance it might be required to provide was to compel its citizens to involuntarily provide testimony before the Court, and to criminally sanction them if they failed to do so. Rather, the Government clearly understood that the States Parties intended to create an international court, which had slightly different attributes than their domestic courts. It is for this reason that the States agreed that Article 93(l)(e), which was domesticated in Section 20(1)(a)(vi) of the International Crimes Act, No. 16 of 2008, was *lex specialis* with respect to facilitating the appearance of witnesses before the Court – voluntarily. Had the States intended for the ICC to have an enforceable subpoena power, it would have clearly written those provisions into not only the Rome Statute but into its domestic implementing legislation,

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<sup>19</sup>See also, Dissent, paras. 22 and 23; Ruto Defence LTA, para.14; Sang Defence LTA, para. 18.



in a standardised way. A *post-facto* interpretation of the Statute belittles the intention and *travaux préparatoire*<sup>20</sup> of the participating States Parties.

23. To suggest, as the majority does, that the Kenyan Government must now make itself subservient to orders of the Court on the basis of a notion of implied powers, a residual powers provision in Article 93(1)(l), and an interpretation of Kenyan law provided by the Common Legal Representative of Victims and a Kenyan High Court judge sitting in a different matter, rather than that espoused by the Attorney General of the Republic of Kenya,<sup>21</sup> negatively impacts on the integrity and sovereignty of Kenya as a nation-State. This is improper and certainly not fair. Indeed, the Dissenting Judge stated:

“It is dangerous to extend the scope of a residual provision in Article 93(1)(l) to include something that was foreseen and in fact was excluded from the primary provision”.<sup>22</sup>

24. In these circumstances, the Government of Kenya should not be set up by the Trial Chamber such that it may be perceived later as in conflict with orders of the Court, and subject to its own sanction before the Assembly of States Parties.<sup>23</sup>

## V. RELIEF REQUESTED

25. For the foregoing reasons, and given the novelty and significance of the issues at hand, the Government of Kenya hereby requests that the Trial Chamber:

<sup>20</sup>Decision, paras.141-145, as compared to Dissent, paras. 13-14.

<sup>21</sup>Decision, paras. 159-160.

<sup>22</sup>Dissent, para. 16.

<sup>23</sup>For example, if the Trial Chamber finds that the Government of Kenya has not cooperated with the Court by “failing” to execute the summons Decision in some way, the Trial Chamber may, pursuant to Article 87(7), refer the matter to the Assembly of States Parties. *Prosecutor v. al Bashir*, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, 9 April 2014, para. 34.

- i. Grant leave to the Government of Kenya to make *amicus curiae* observations;
- ii. If leave is granted pursuant to Rule 103(1), the Kenyan Government respectfully requests that its substantive submissions in this filing as made out above be treated as its written observations for the purposes of Rule 103; and
- iii. Grant leave to file *amicus* submissions in the respective appeals regarding the issues identified by the Ruto Defence and the Sang Defence in their respective applications for leave to appeal.

Respectfully Submitted,



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Githu Muigai, SC  
Attorney General of the Republic of Kenya  
Dated 12 May 2014  
At Nairobi