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**International
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TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

Public

Decision on defence applications for leave to appeal the “Decision on 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

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

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Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’ or ‘ICC’), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 82(1)(d) of the Rome Statute (the ‘Statute’) and Rule 103 of the Rules of Procedure and Evidence (the ‘Rules’), renders, by majority, Judge Eboe-Osuji dissenting on the issue of leave to appeal, this ‘Decision on Defence applications for leave to appeal the Decision on Witness Summonses and on the request of the Government of Kenya to submit *amicus curiae* observations’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 17 April 2014, the Chamber issued, by majority, Judge Herrera Carbuccion dissenting, the ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’ (‘Impugned Decision’),¹ in which it found that: (i) the Chamber has the power to compel witness testimony; (ii) it can, by way of a request for cooperation, obligate the Government of the Republic of Kenya (the ‘Government of Kenya’) to serve summonses and to assist in compelling the appearance of witnesses subject to a subpoena; (iii) Kenyan domestic law does not prohibit such cooperation requests; and (iv) in this case, the Office of the Prosecutor (‘Prosecution’) has justified its request for the summonses of eight witnesses.²
2. In her Dissenting Opinion, Judge Herrera Carbuccion agreed that ‘Article 64(6)(b) of the Statute allows the Chamber to issue summonses vis-à-vis witnesses who are not willing to testify in court voluntarily’.³ However, she dissented from the Majority’s

¹ ICC-01/09-01/11-1274. A first corrigendum was filed on 29 April 2014 and a second was filed on 30 April 2014, ICC-01/09-01/11-1274-Corr2.

² ICC-01/09-01/11-1274-Corr2, para. 193.

³ Dissenting Opinion of Judge Herrera Carbuccion on the ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’, (‘Dissenting Opinion’), 29 April 2014, ICC-01/09-01/11-1274-Anx, paras 8-9.

finding that 'the Government of Kenya has the legal obligation, pursuant to Article 93(1)(d) and (l) of the Statute, to enforce such a summons'.⁴

A. Requests made by the Government of Kenya

3. On 25 April 2014, the Government of Kenya requested notification of the Impugned Decision and Dissenting Opinion in accordance with Regulation 31 of the Regulations of the Court ('Government of Kenya's First Request').⁵ It further requested ten days, from the date of notification, to file a request for leave to appeal the Impugned Decision, or in the alternative, leave to submit *amicus curiae* observations pursuant to Rule 103(1) of the Rules.⁶
4. On 2 May 2014, the Prosecution filed a response opposing the Government of Kenya's First Request.⁷ On the same day, the Chamber issued a decision on the Government of Kenya's First Request.⁸ Therein, it granted, *inter alia*, a ten-day extension to the Government of Kenya to file no later than 12 May 2014, 'any application they find it appropriate to make'.⁹
5. On 5 May 2014, the Prosecution filed an urgent request for an extension of time to file a consolidated response to any applications for leave to appeal, including submissions made by the Government of Kenya.¹⁰ The defence team for Mr Ruto (the 'Ruto Defence') filed a response in which it opposed the aforementioned

⁴ ICC-01/09-01/11-1274-Anx, paras 1 and 9.

⁵ 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, ICC-01/09-01/11-1277.

⁶ ICC-01/09-01/11-1277, paras 4-5.

⁷ 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, ICC-01/09-01/11-1284.

⁸ 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, ICC-01/09-01/11-1287.

⁹ ICC-01/09-01/11-1287, para. 8.

¹⁰ Urgent Prosecution Request for Extension of Time to Respond to any Applications for Leave to Appeal the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1290, para. 1.

request,¹¹ whilst the defence team for Mr Sang (the 'Sang Defence') expressed that it neither supported nor opposed the Prosecution's request.¹² On 7 May 2014, the Chamber granted the Prosecution leave to file a consolidated response by 16 May 2014.¹³

6. On 12 May 2014, the Government of Kenya filed a request for leave to make *amicus curiae* observations ('Rule 103 Application').¹⁴ Therein, it submits that although it accepts the Majority's finding that the Chamber may issue a summons for voluntary witnesses, it takes issue with any obligation imposed upon a State to compel unwilling witnesses to appear before the Court.¹⁵ The Government of Kenya avers that the Chamber should entertain its observations for the following reasons: (i) it has already participated in the written and oral proceedings upon which the Impugned Decision is based; (ii) the issue in need of resolution by the Chamber is 'novel' because the Court has never previously requested the cooperation of a State in compelling witness testimony; (iii) an obligation upon a State to compel witness testimony impacts that State's interests; and (iv) the Government of Kenya is best placed to address how the issues of fairness and expeditiousness of trial 'play out in the national Kenyan context and legal system'.¹⁶
7. The Government of Kenya additionally provides substantive submissions in its filing which it requests that the Chamber treat as its observations, should the leave

¹¹ Defence response to "Urgent Prosecution Request for Extension of Time to Respond to any Applications for Leave to Appeal the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'", 6 May 2014, ICC-01/09-01/11-1294.

¹² Sang Defence Response to the Urgent Prosecution Request for Extension of Time to Respond to any Applications for Leave to Appeal the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 7 May 2014, ICC-01/09-01/11-1296.

¹³ Decision on urgent Prosecution request for extension of time to respond to any applications for leave to appeal the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation', ICC-01/09-01/11-1297.

¹⁴ 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, ICC-01/09-01/11-1304.

¹⁵ ICC-01/09-01/11-1304, paras 6-9.

¹⁶ ICC-01/09-01/11-1304, paras 15-18.

requested therein be granted.¹⁷ Particularly, it raises concerns regarding the fairness of the proceedings for both itself and the eight Kenyan witnesses. It submits that all inquiries into post-election violence in Kenya have in the past been voluntary in nature and that to compel witnesses to participate, when they likely assumed that the same circumstances applied, is unfair.¹⁸ Additionally, the Government of Kenya submits that when it was signing the Statute, there was nothing in the Statute's terms that would have put it on notice of a requirement that it assist the Court in compelling witness testimony.¹⁹

8. In conclusion, the Government of Kenya requests that it be granted leave to make *amicus curiae* observations, and that its substantive submissions are treated as such. It further requests leave to file *amicus curiae* observations 'in the respective appeals regarding the issues identified by the Ruto Defence and the Sang Defence'.²⁰ In addition to the foregoing pleas, though not repeated in the 'Relief Requested', the Government of Kenya requests that the Registry suspend its request for assistance until the Chamber reaches a determination on the Defence applications for leave to appeal.²¹
9. On 16 May 2014, the Prosecution responded to the Rule 103 Application, contending that such a request should be denied ('Prosecution's Consolidated Response').²² The Prosecution submits, preliminarily, that the Government of Kenya's request is procedurally flawed for the following reasons: (i) the Government of Kenya seeks leave to appear as *amicus curiae* while simultaneously providing substantive Rule 103 submissions; and (ii) its submissions 'impermissibly argue the merits of the question before the Chamber, namely

¹⁷ ICC-01/09-01/11-1304, para. 25(ii).

¹⁸ ICC-01/09-01/11-1304, paras 20-21.

¹⁹ ICC-01/09-01/11-1304, para. 22.

²⁰ ICC-01/09-01/11-1304, para. 25.

²¹ ICC-01/09-01/11-1304, para. 12.

²² Prosecution's Consolidated Response to the Applications filed by the Defence for Mr Ruto and Mr Sang for Leave to Appeal the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" and the Government of the Republic of Kenya's Request for Leave pursuant to Rule 103(1) to join as *amicus curiae*, ICC-01/09-01/11-1309, para. 48.

whether leave to appeal should be granted'.²³ More substantively, the Prosecution submits that the Government of Kenya fails to demonstrate how its observations may meaningfully assist the Chamber in its determination of whether to grant leave to appeal, and instead merely repeats the submissions made by the Defence in their respective applications.²⁴

10. The Prosecution further argues that the Government of Kenya erroneously requested: (i) leave from the Chamber to file *amicus* submissions in the respective appeals, as such a determination should be made by the Appeals Chamber; and (ii) suspensive effect as to the Registry's request for assistance, which the Prosecution also argues the Chamber cannot grant.²⁵

B. Applications for Leave to Appeal the Impugned Decision

11. On 5 May 2014,²⁶ the Ruto Defence and the Sang Defence filed their applications for leave to appeal the Impugned Decision ('Ruto Application' and 'Sang Application'; collectively 'Defence Applications'), in which they requested leave to appeal nine issues, in total.²⁷
12. In the Prosecution's Consolidated Response filed 16 May 2014, the Prosecution acknowledged that two discrete issues arising from the Impugned Decision merited an appeal, pursuant to Article 82(1)(d).²⁸

²³ ICC-01/09-01/11-1309, paras 39-40.

²⁴ ICC-01/09-01/11-1309, paras 41-45.

²⁵ ICC-01/09-01/11-1309, para. 47.

²⁶ In an email to the Ruto and Sang Defence teams, the Chamber suspended the 5-day time limit to file any request for leave to appeal and informed the parties that they shall be deemed notified of the Impugned Decision upon notification of the Dissenting Opinion. Email communication from Legal Officer of Trial Chamber V(A) on 23 April 2014 at 10:52.

²⁷ Defence application for leave to appeal the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State party Cooperation", ICC-01/09-01/11-1291; Sang Defence Request for Leave to Appeal the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1293.

²⁸ ICC-01/09-01/11-1309, para. 2.

(a) *Ruto Defence Submissions*

13. The Ruto Defence seeks leave to appeal the following three issues:

- (i) 'Whether the Decision, in so far as it obligates Kenya to compel the appearance before the Chamber of witnesses subject to an ICC summons, breaches the Court's obligations under Articles 21 and 22 of the Statute, in particular the principle of legality and the guarantees of due process' ('First Ruto Defence Issue');
- (ii) 'Whether the Majority erred in holding that Article 93(1)(e) does not comprehensively address State Parties' obligations with respect to facilitating the appearance of witnesses before the Court and that Kenya may be obligated pursuant to Articles 93(1)(d) and (l) to not only serve summonses but to compel the attendance of the witnesses thus summonsed' ('Second Ruto Defence Issue');
- (iii) 'Whether the Majority erred by requiring the existence of a law expressly prohibiting the enforcement of an ICC summons to be necessary in order for Kenya to submit in good faith that such assistance is prohibited by its domestic law per Article 93(1)(l) as opposed to Kenya demonstrating in good faith that existing fundamental legal principles of general application, such as the internationally recognized human rights standards of the principle of legality and the prohibition against retroactive penalties, prohibit said assistance' ('Third Ruto Defence Issue').²⁹

14. The Ruto Defence submits that its first issue qualifies as an appealable issue, for purposes of Article 82(1)(d) of the Statute, as it arises from the Majority's conclusion that "'as a general proposition" a Chamber "has the power to compel the testimony of witnesses"'.³⁰ It submits that, in making this finding, the Majority failed to properly consider Articles 21 (establishing the hierarchy of applicable law and the obligation to interpret the law consistent with internationally recognised human rights) and 22 (enshrining the principle of *nullum crimen sine lege*) of the Statute.³¹

²⁹ ICC-01/09-01/11-1291, para. 6.

³⁰ ICC-01/09-01/11-1291, para. 9, citing ICC-01/09-01/11-1274-Corr2, paras 59(i) and 193(i).

³¹ ICC-01/09-01/11-1291, para. 9.

15. With regard to its second issue, the Ruto Defence submits that it emanates from the Majority's findings that: (i) Articles 93(1)(d) and (l) of the Statute allow the Chamber to obligate the Government of Kenya to serve summonses and assist in compelling the attendance of witnesses thus summoned;³² and (ii) the Statute did not 'expressly and comprehensively' deal with the appearance of witnesses before the Court via Article 93(1)(e) of the Statute.³³
16. The Ruto Defence contends that the Third Ruto Defence Issue arises from the Majority's holding that Kenyan domestic law does not prohibit cooperation requests of this nature.³⁴ It submits that the Majority failed to indicate that it considered the following when reaching its conclusion: (i) a statement made by the Attorney General that the Government of Kenya cannot 'without violating the [Kenyan] constitution compel any person who does not volunteer to be a witness to become a witness';³⁵ and (ii) submissions by both the Attorney General and the Defence that the relief requested contravenes internationally recognised human rights standards 'which are also recognized under Kenyan law'.³⁶
17. The Ruto Defence submits that these three issues significantly affect the fair conduct of proceedings. It argues that, if the issues were wrongly decided, a 'significant portion' of the Prosecution's evidence will have been obtained in contravention of fundamental human rights standards and guarantees of due process, and with respect to the Second Issue, 'without any proper statutory legal basis'.³⁷ The Ruto Defence submits that the fairness of the proceedings would be additionally affected by: (i) the uncertainty the parties would face during trial, pending resolution by the Appeals Chamber of whether the testimony may be relied upon; and (ii) the involuntary appearance of witnesses who, in order to

³² ICC-01/09-01/11-1291, para. 10, *citing* ICC-01/09-01/11-1274-Corr2, para. 193(ii).

³³ ICC-01/09-01/11-1291, para. 10, *citing* ICC-01/09-01/11-1274-Corr2, paras 118, and 147-148.

³⁴ ICC-01/09-01/11-1291, para. 11, *citing* ICC-01/09-01/11-1274-Corr2, para. 193(iii).

³⁵ ICC-01/09-01/11-1291, para. 11, *citing* ICC-01/09-01/11-T-86-CONF-ENG ET, p. 49, lines 18-21.

³⁶ ICC-01/09-01/11-1291, para. 11.

³⁷ ICC-01/09-01/11-1291, para. 14.

avoid fines and/or imprisonment, will feel coerced into adopting their original statements.³⁸ The Ruto Defence adds that the fair conduct of the trial vis-à-vis the witnesses will have been significantly affected if they are compelled to testify in breach of their human right protections and when the Victims and Witnesses Unit cannot guarantee their physical safety.³⁹

18. The Ruto Defence further submits that the three issues significantly affect the expeditious conduct of the proceedings because the Impugned Decision would obligate the Government of Kenya to provide assistance via a series of time-consuming steps, including the: (i) locating of witnesses; (ii) enactment of domestic legislation; (iii) implementation of the modalities required for obtaining witness testimony; and (iv) implementation of security arrangements for witnesses and the conduct of proceedings.⁴⁰ The Ruto Defence also submits that the issues, if wrongly decided, will significantly affect the outcome of the trial because the Article 74 judgement will have been, in part, based on 'compelled witness testimony which should not be before the Court' and may, accordingly, be partially nullified by the Appeals Chamber.⁴¹

19. The Ruto Defence lastly submits that the immediate resolution of these issues by the Appeals Chamber could materially advance the proceedings. It argues that it can be reasonably anticipated that the Prosecution will submit requests to subpoena future witnesses and the resolution of the matter by the Appeals Chamber at this stage will ensure the proceedings 'follow the right course'.⁴²

³⁸ ICC-01/09-01/11-1291, paras 15 and 17.

³⁹ ICC-01/09-01/11-1291, para. 16.

⁴⁰ ICC-01/09-01/11-1291, para. 19. The Defence further submits that these implementing steps will not only take a considerable period of time, but may also involve further litigation. ICC-01/09-01/11-1291, para. 20.

⁴¹ ICC-01/09-01/11-1291, para. 24.

⁴² ICC-01/09-01/11-1291, para. 27.

(b) *Sang Defence Submissions*

20. In the Sang Application, the Sang Defence seeks leave to appeal the following six issues:

- (i) '[W]hether the ICC is competent to issue a subpoena to compel a witness to appear and testify before it' ('First Sang Defence Issue');
- (ii) '[W]hether the ICC is competent to obligate a State Party to compel a witness to appear before it against his/her will, and whether the ICC can subsequently require the State party to sanction a non-compliant witness' ('Second Sang Defence Issue');
- (iii) '[W]hether a request to the Government of Kenya to compel the appearance of a witness is prohibited by Kenyan law and the Rome Statute operating as part of Kenyan law' ('Third Sang Defence Issue');
- (iv) '[W]hether the concept of "complementarity" in the Rome Statute:
 - a. allows judges to confer upon themselves the role of interpreting the Kenyan Constitution and domestic implementing legislation [...] notwithstanding the fact that such constitutions have expressly reserved the powers of interpretation of such constitutions and laws to domestic courts
 - b. in conjunction with the majority's notion of the ICC's "legal personality" [...] can be combined such that they vest the Court with the same powers as ordinarily held by domestic courts' ('Fourth Sang Defence Issue');
- (v) '[W]hether the Prosecution has justified issuing the subpoena as requested, in this case, on the basis of their relevance, specificity and necessity' ('Fifth Sang Defence Issue'); and
- (vi) '[W]hether the majority has adequately upheld its obligation pursuant to Article 68(1) to protect the physical and psychological health and well-being of witnesses, especially Witness 15, by compelling them to testify against their will and abdicating responsibility to the Government of Kenya to ensure their safety' ('Sixth Sang Defence Issue').⁴³

⁴³ ICC-01/09-01/11-1293, para. 3.

21. The Sang Defence submits that its six issues emanate directly from the Impugned Decision and constitute more than mere disagreements with the Majority's findings.⁴⁴ The Sang Defence submits that its first issue arises from a core conclusion made by the Chamber, namely that Article 4(1) of the Statute in conjunction with a 'broad interpretation of the Court's implied powers' affords the Chamber the power to subpoena witnesses who no longer wish to cooperate with the Court.⁴⁵ The Sang Defence contends that its second issue is in response to the Majority's finding that the Court can obligate a State Party to compel a witness to testify pursuant to Article 86 of the Statute which imposes upon State Parties an obligation to 'cooperate fully' with the Court,⁴⁶ whilst its third and fourth sixth issues were addressed by the Majority in paragraphs 165-179 and paragraph 138, respectively.⁴⁷
22. In relation to its fifth issue, the Sang Defence argues that when assessing whether the Prosecution's requests for subpoenas satisfied the tripartite principles of relevance, specificity and necessity, the Majority made only cursory determinations as to both relevance and specificity.⁴⁸ It also argues that although the Majority did order the Government of Kenya to provide security for the eight witnesses, it made no reference to Article 68(1) of the Statute in the Impugned Decision. This gives rise, the Defence contends, to the final issue regarding whether the Majority adequately considered its Article 68(1) obligations to protect the physical and psychological well-being of witnesses.⁴⁹
23. The Sang Defence submits that the issues raised affect the fair conduct of the trial, as the accused, having 'long been plagued with a changing Prosecution witness list', has a right to know with certainty the witnesses that will testify against him. It

⁴⁴ ICC-01/09-01/11-1293, paras 10 and 17.

⁴⁵ ICC-01/09-01/11-1293, para. 11, *citing* ICC-01/09-01/11-1274-Corr2, paras 74 and 83.

⁴⁶ ICC-01/09-01/11-1293, para. 12, *citing* ICC-01/09-01/11-1274-Corr2, paras 103 and 151.

⁴⁷ ICC-01/09-01/11-1293, paras 13-14.

⁴⁸ ICC-01/09-01/11-1293, para. 15, *citing* ICC-01/09-01/11-1274-Corr2, paras 182 and 184.

⁴⁹ ICC-01/09-01/11-1293, para. 16.

also contends that the fair conduct of the proceedings will be affected vis-à-vis the witnesses when considering that they were unaware that their initial cooperation with the Prosecution would obligate them to testify at a later stage and possibly expose them to criminal sanctions if they failed to do so. The Sang Defence further submits that the Majority's 'expansionist reading of the Statute' is unfair to the Government of Kenya, who agreed to terms of the Statute which did not include an obligation to compel witnesses to testify against their will.⁵⁰ It adds that the Impugned Decision will affect the expeditiousness of the proceedings given that: (i) the eight witnesses may be difficult to locate and serve; and (ii) a witness may challenge the summons in a Kenyan court proceeding that will likely take 'upwards of six months'.⁵¹

24. Lastly, the Sang Defence submits that the final outcome of the trial largely depends on whether the eight witnesses appear before the Court and the veracity of their testimony if and when they do. Like the Ruto Defence, the Sang Defence argues that an immediate resolution of the aforementioned issues may materially advance the proceedings because it would: (i) 'bring clarity to the scope and anticipated length of the Prosecution case' and; (ii) avoid a future re-trial resulting from an Article 74 Judgement that the Appeals Chamber may find was partially based on the erroneous issuance of a subpoena.⁵²

(c) Prosecution Submissions

25. In the Prosecution's Consolidated Response, the Prosecution acknowledges that, notwithstanding its agreement with the Chamber's ultimate findings, two discreet issues, proposed by the Defence but reframed as follows, arise from the Impugned Decision and warrant appellate review:

⁵⁰ ICC-01/09-01/11-1293, para. 18.

⁵¹ ICC-01/09-01/11-1293, paras 19-20.

⁵² ICC-01/09-01/11-1293, paras 21-24.

- i. 'Whether the Trial Chamber has the power to compel the testimony of witnesses on the basis of Article 64(6)(b) and/or other sources of applicable law' ('First Prosecution Issue'); and
 - ii. 'Whether the Government of Kenya [...] as a State Party to the Rome Statute can be obliged, under Article 93 and/or other sources of applicable law, to compel and ensure the appearance of witnesses at the request of the Trial Chamber, including whether there is a specific prohibition under Kenyan national law' ('Second Prosecution Issue').⁵³
26. The Prosecution submits that its proposed issues reframe the First, Second and Third Ruto and Sang Defence Issues (along with appended sub-issues) to more accurately convey the principles underlying the Impugned Decision.⁵⁴ The Prosecution argues that if leave to appeal is granted on the two proposed issues alone, the Defence will still have the opportunity to raise arguments on the merits of 'some of the matters now incorrectly presented as issues for leave to appeal'.⁵⁵ The Prosecution further contends that the Fourth, Fifth and Sixth Sang Defence Issues are mere disagreements and grievances with the Impugned Decision which do not qualify as 'appealable' issues under Article 82(1)(d) of the Statute.⁵⁶
27. The Prosecution contends that its proposed issues significantly affect the outcome of the trial since they 'directly affect' the scope of the evidence that will be available when the Chamber makes its Article 74 determination.⁵⁷ However, it disagrees with the Defence's contention that the Article 74 judgment would be based, in part, on evidence that should not have been before the Chamber. The Prosecution notes that given the high threshold in Article 69(7) of the Statute for the exclusion of evidence,

⁵³ ICC-01/09-01/11-1309, paras 2-3.

⁵⁴ ICC-01/09-01/11-1309, paras 13, 15 and 19-20.

⁵⁵ ICC-01/09-01/11-1309, para. 13.

⁵⁶ ICC-01/09-01/11-1309, para. 26.

⁵⁷ ICC-01/09-01/11-1309, para. 30.

the witnesses' testimony would not necessarily be excluded from the Chamber's consideration.⁵⁸

28. The Prosecution additionally submits that its two proposed issues significantly affect the fair conduct of the proceedings because, in eliciting the testimony of witnesses central to its case, the Prosecution is able to properly exercise the powers and duties under Article 54 of the Statute and, consequently, affect the scope and presentation of the Defence's case as well. The Prosecution takes issue, however, with the Defence's reliance on the witnesses' and Government of Kenya's disagreements with the Chamber's procedures as relevant considerations.⁵⁹ The Prosecution further submits that its proposed issues significantly affect the expeditiousness of the proceedings given that, *inter alia*, they 'may have an impact on how the Prosecution goes about selecting its witnesses'.⁶⁰ The Prosecution disagrees with the Defence claim that steps that the Government of Kenya will need to take in order to implement the Impugned Decision will significantly affect the expeditious of the trial.⁶¹
29. Lastly, the Prosecution argues that in light of the 'relevance and importance' of the witnesses' testimony to its case, an appellate determination of the issues would materially advance the proceedings by ensuring they 'move forward in the correct way'.⁶²

⁵⁸ ICC-01/09-01/11-1309, para. 31.

⁵⁹ ICC-01/09-01/11-1309, paras 32-34.

⁶⁰ ICC-01/09-01/11-1309, para. 35, quoting *The Prosecutor v. Germain Katanga*, Pre-Trial Chamber I, Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, 19 December 2007, ICC-01/04-01/07-116, page 6.

⁶¹ ICC-01/09-01/11-1309, para. 36.

⁶² ICC-01/09-01/11-1309, para. 37.

II. APPLICABLE LAW

(a) Applications for leave to file amicus curiae observations

30. Rule 103(1) of the Rules provides that ‘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’.

(b) Applications for leave to appeal

31. Article 82(1)(d) of the Statute sets out the requirements applicable to the granting of a request for leave to appeal, which are as follows:

- i. whether the decision involves an issue that would significantly affect:
 - i. the fair and expeditiousness conduct of proceedings; or
 - ii. the outcome of the trial; and
- ii. in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

32. The Chamber recalls that, for the purposes of the first prong of this test, the Appeals Chamber has defined an ‘issue’ as ‘an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion’.⁶³

33. The Appeals Chamber has held that ‘the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable

⁶³ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 April 2006, ICC-01/04-168, para. 9.

issue. By the plain terms of article 82(1)(d) of the Statute, a Pre-Trial or Trial Chamber may certify such a decision on its own accord'.⁶⁴

III. ANALYSIS AND CONCLUSIONS

Government of Kenya requests

34. The Chamber considers that *amicus curiae* observations by the Government of Kenya, the entity to which the disposition of the Impugned Decision is, in part, directed, could assist the Chamber in its assessment of the Defence Applications. The Chamber, pursuant to Rule 103(1) of the Rules, therefore grants the Government of Kenya leave to file such observations.
35. The Chamber observes that the Government of Kenya filed its substantive observations as part of the Rule 103 Leave Application.⁶⁵ In principle, such observations should be made only after leave to file observations is granted.⁶⁶ The Chamber will nevertheless, on an exceptional basis, accept the substantive observations and has taken note of their content.
36. Rule 103(2) of the Rules provides that the parties have the opportunity to respond to *amicus curiae* observations. The Chamber notes that the Prosecution responded to the observations. Although the deadline for responses has not yet expired, the Chamber further notes that the Government of Kenya supports the Defence Applications. For that reason, and in the interest of an expeditious decision on the Defence Applications, the Chamber considers it appropriate to issue the present decision without having heard Defence responses, if any.

⁶⁴ ICC-01/04-168, para. 20.

⁶⁵ ICC-01/09-01/11-1304, paras 19-24.

⁶⁶ See *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. 9.

37. The Government of Kenya further requested to be granted leave to file Rule 103(1) observations in eventual interlocutory appeal proceedings.⁶⁷ Any request to make observations should be made to the competent chamber. A request to act as *amicus curiae* in (interlocutory) appeals proceedings, if leave is granted, must be filed with the Appeals Chamber. Accordingly, the Chamber rejects this part of the Rule 103 Application.
38. Similarly, any request for suspensive effect of interlocutory appeal proceedings should be made with the Appeals Chamber, which, at the relevant time, can decide whether to entertain such a request to use its discretionary power to grant suspensive effect. This part of the relief requested is therefore rejected.

Defence Applications

39. It must first be determined whether the issues raised in the Defence Applications are 'appealable issues' within the meaning of the jurisprudence of the Court. As a preliminary observation, it may be noted that considerable overlap exists between the issues as phrased by the Ruto Defence and those proposed by the Sang Defence. Furthermore, certain issues appear to be subsumed by other issues.
40. When assessing the First Ruto Defence Issue and the First Sang Defence Issue jointly, it is clear that they both deal with the question whether the Court has the power to compel witnesses to testify. The Prosecution has also proposed that leave to appeal the Impugned Decision be granted for this question. Similarly, the Second Ruto Defence Issue and the Second Sang Defence Issue both address whether an ICC State party can be obliged to compel a witness. The Prosecution supports the core question that forms part of these issues. In light of the overlap between the issues identified by the two defence teams, the Majority considers it warranted to combine these issues into discrete issues focussing on a clear legal question. In

⁶⁷ ICC-01/09-01/11-1304, para. 25.

accordance with its discretion to formulate appealable issues,⁶⁸ the Majority will therefore reformulate these issues as follows:

- 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').
41. As regards the Third Ruto Defence Issue, the Ruto Defence argues that the Chamber's request is prohibited by Kenyan law because it is in breach of the same fundamental legal principles also argued under the First and Second Ruto Defence Issues. As such, the Majority considers the Third Ruto Defence Issue to be subsumed under the First and Second Ruto Defence Issues.
42. The Third Sang Defence Issue and the first part of the Fourth Sang Defence Issue both relate to Kenyan national law and the application of the Statute in Kenya. These two issues are therefore already subsumed by the Second Issue, as reformulated, which addresses whether Kenya has to co-operate with the Court and can be obliged to act upon the summonses.
43. The Fifth Sang Defence Issue, by seeking leave to appeal 'whether the Prosecution has justified issuing the subpoena as requested' is little more than a challenge to the entirety of the Chamber's factual analysis in the Impugned Decision⁶⁹ and the Chamber's analysis made therein. The Majority does not consider this to be 'an

⁶⁸ See ICC-01/04-168, para. 20.

⁶⁹ ICC-01/09-01/11-1274-Corr2, paras 180-192

identifiable subject or topic' for which leave can be granted.⁷⁰ As the issue is not sufficiently discrete, it does not qualify as appealable issue.⁷¹

44. As to the Sixth Sang Defence Issue, the Majority observes that it can be separated into two parts: i) whether the Chamber can compel witnesses consistently with Article 68(1) of the Statute; and ii) whether the Chamber could abdicate its responsibility with respect to the security of witnesses to the Government of Kenya. The Majority considers that the first part is subsumed under the First Sang Defence Issue. As it is clear that no abdication of responsibility to the Government of Kenya has occurred as a result of the Impugned Decision, the second part does not arise from it. The Sixth Sang Defence Issue therefore does not qualify as an appealable issue.

45. The Majority will therefore assess whether the two reformulated appealable issues fulfil the criteria of Article 82(1)(d) of the Statute.

46. The Majority now turns to the second criterion: whether the issues, as rephrased by the Majority, would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

47. As to the fair and expeditious conduct of the proceedings, the Majority considers that when witnesses are included in the Prosecution's list of witnesses, the normal course of events would be that all these witnesses testify during the phase of the proceedings during which the Prosecution presents its evidence. The Majority notes that the eight witnesses for whom summonses are issued in the Impugned Decision were included in the Prosecution's witness list, with approval by the

⁷⁰ ICC-01/04-168, para. 9.

⁷¹ See Decision on the joint defence request for leave to appeal the decision on witness preparation, ICC-01/09-01/11-596, 11 February 2013, paras 11-12.

Chamber at the time.⁷² Consequently, if these eight witnesses do in fact testify, in principle, no unfairness to the accused arises.

48. Furthermore, the Majority is not convinced by the Ruto Defence's argument that the Chamber, for the purposes of Article 82(1)(d) of the Statute, should consider whether 'the fair conduct of proceedings vis-à-vis these witnesses' is significantly affected. Similarly, in the Majority's opinion the alleged unfairness to the Government of Kenya, arising out of the Impugned Decision, if any, does not form part of the consideration for the second criterion of Article 82(1)(d) of the Statute. Moreover, it appears that the Ruto Defence contests the legality of compelling witnesses to testify through summonses or subpoenas in general, not just before the Court but in any legal system.⁷³ The Majority therefore considers that the Ruto Defence's argument that witnesses, as a result of being subpoenaed, would feel coerced into adopting their original statements is without merit or factual basis.
49. However, the Majority is of the view that the fairness of the proceedings in its own merits would be significantly affected by the uncertainty that all parties are faced with, if final resolution of the matter by the Appeals Chamber would only take place during an appeal on the merits. The Majority considers undesirable a situation in which the parties, during further trial proceedings, as well as the preparation of closing briefs and arguments, would not know whether the *viva voce* evidence adduced from the eight witnesses can be relied on or, alternatively, would be in need of substitution or introduction in a different manner, or would need to be challenged. In the view of the Majority, such uncertainty for the parties significantly affects the fairness of the proceedings.
50. As to the impact on the expeditiousness of the proceedings, the Majority agrees with the Defence that it can be anticipated that the Prosecution will submit further

⁷² Prosecution's updated witness list and witness summaries, 2 September 2013, ICC-01/09-01/11-898.

⁷³ ICC-01/09-01/11-1291, para. 17.

requests to summon witnesses, which in turn would have an effect on the expeditiousness of the trial proceedings against Mr Sang and Mr Ruto.

51. In the present situation, the Majority considers that it cannot be foreseen whether the Majority will find the eight witnesses that are subject to summonses to be credible, or whether it will rely on their testimonies when making a determination, if any, on the guilt of the accused. Be that as it may, the Majority recalls that it found, based on the information provided in the Prosecution's request for summonses, that '[e]ach of these witnesses may provide important testimony on the crimes charged and the individual responsibility of the accused'.⁷⁴ In light of the total number of Prosecution witnesses, the bulk of evidence consisting of the anticipated testimony of these eight witnesses would be so substantial that, if relied on, it objectively may be expected to have a significant impact on 'outcome' at the trial level.
52. In addition, if the Appeals Chamber, during appeals proceedings pursuant to Article 81 of the Statute, if applicable, were to find the Impugned Decision to be in error, this may lead to the testimonies provided by the eight witnesses being stricken from the trial record. The potential consequences flowing therefrom would significantly affect the outcome of the trial, and in turn would have a bearing on the expeditiousness.
53. As to the question whether the proceedings may be materially advanced by an immediate resolution by the Appeals Chamber, the Chamber notes the apparent contradiction between the Ruto Defence's desire for the trial to proceed as speedily as possible and its opposition to adjournments requested by the Prosecution,⁷⁵ on the one hand, and on the other hand its request for an interlocutory decision by the

⁷⁴ ICC-01/09-01/11-1274-Corr2, para. 185.

⁷⁵ Hearing on 16 May 2014, ICC-01/09-01/11-T-115-CONF-ENG ET, page 10, lines 9-13, when the Ruto Defence stated: 'Your Honour, we want this case to close before the summer break. It is causing understandably huge difficulties for the clients, for Mr Ruto, for Mr Sang. Their name has been tarnished long enough. We want this case to come to an end. Your Honour, there is no reason why the Prosecution should be given an indulgence to have adjournments as if it's a matter of course.'

Appeals Chamber on the matter. The Chamber affirms the right of the accused to be tried without undue delay and consequently this would be assisted by a prompt resolution of the appeal. However, and notwithstanding the wishes of the parties, expressed either jointly or separately, the Majority considers that the unfairness arising out of the uncertainty as to the evidence that can be relied on warrants resolution by the Appeals Chamber through an interlocutory appeal. In addition, if the Majority were to be called upon to decide on requests to summon other witnesses in the future, it would be beneficial if it can take into account the Appeals Chamber's determination of the issues to prevent unnecessary delays.

54. For these reasons, the majority of the Chamber is satisfied that the resolution of the First Issue and Second Issue in the Impugned Decision during appeals proceedings has the potential to significantly affect the outcome of the trial, as well as the fair and expeditious conduct of the proceedings, and that an immediate resolution by the Appeals Chamber materially advances the proceedings.

FOR THE FOREGOING REASONS, THE CHAMBER, HEREBY

GRANTS the Government of Kenya leave to file observations pursuant to Rule 103(1) of the Rules;

ACCEPTS the Rule 103 Application as the Government of Kenya's *amicus curiae* observations;

REJECTS the remainder of the relief sought in the Rule 103 Application; and

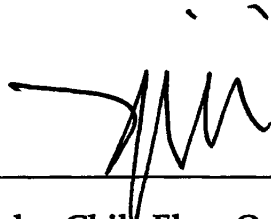
BY MAJORITY, Judge Eboe-Osuji dissenting, HEREBY

GRANTS the Ruto Defence and the Sang Defence, jointly, leave to appeal the Impugned Decision on the First Issue and Second Issue, as identified in paragraph 40; and

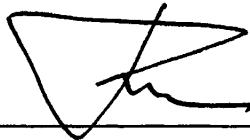
REJECTS all other requests.

Judge Eboe-Osuji appends a partly dissenting opinion as regards the leave to appeal.

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



Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccia

Judge Robert Fremr

Dated 23 May 2014

At The Hague, The Netherlands