

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 25 April 2014

**TRIAL CHAMBER V(A)**

Before: Judge Chile Eboe-Osuji, Presiding  
Judge Olga Herrera Carbuca  
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 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**

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**

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Mr James Stewart  
Mr Anton Steynberg

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**Legal Representatives of the Victims**

Mr Wilfred Nderitu

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

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**The Office of Public Counsel for the  
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. According to a press release<sup>1</sup> and a public filing issued by the International Criminal Court ("ICC") on 17 April 2014, the Government of the Republic of Kenya ("Government" or "GOK") understands that Trial Chamber V(A) has reached a majority decision on the question of whether eight witnesses may be summoned by the ICC and compelled to testify by the Government of Kenya<sup>2</sup> ("Decision").
2. The Government notes from the face of the Decision<sup>3</sup> that the GOK was not included as a participant to be notified in accordance with Regulation 31 of the Regulations of the Court. Furthermore, to date, the Government has not received formal service of the Decision from the ICC Registry.<sup>4</sup>
3. The Government presumes this may have been an oversight, as the Government had previously been invited by the Chamber to submit observations on this issue.<sup>5</sup> Indeed, the Government made the requested submissions both orally<sup>6</sup> and in writing<sup>7</sup>. As such, notification of the resultant decision of the Chamber has been expected.

<sup>1</sup> [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr996.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr996.aspx) accessed 17 April 2014.

<sup>2</sup> *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1274, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014. The GOK understands that a dissenting opinion by Judge Carbuca will be issued in due course ("Dissent" or "Dissenting Opinion").

<sup>3</sup> Decision, p. 2.

<sup>4</sup> Such service is typically effected through the official representative designated for proceedings before the Court, who in this case is the Attorney General of the Republic of Kenya, as provided in Regulation 32 (1) of the Regulations of the Court.

<sup>5</sup> *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1165, Decision on status conference and additional submissions related to "Prosecution's request under article 64(6)(h) and article 93 to summon witnesses", 29 January 2014.

<sup>6</sup> See, ICC-01/09-01/11-T-86-Red, Transcript of Oral Hearing, 14 February 2014.

<sup>7</sup> *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1184, The Government of the Republic of Kenya's Submissions on the 'Prosecution's Request under Article 64(6)(b) and Article 93 to Summon Witnesses', 10 February 2014.



4. In the event the lapse in notification was an oversight, the Government requests formal service of the Decision (and its Dissenting Opinion) forthwith. Following service, the Government requests an extension of time – from five days to ten days -- to file a request for leave to appeal the Decision.<sup>8</sup>
5. In the event the failure notification was intentional, or the GOK otherwise lacks standing to seek leave to appeal pursuant to Article 82(1)(d), the Government requests leave pursuant to Rule 103(1) to submit amicus curiae observations on issues arising from the Decision which merit leave to appeal in accordance with Article 82(1)(d).<sup>9</sup> If such leave is granted, the Government requests ten days to file its written submissions from the date on which the Decision and Dissenting Opinion are formally notified.

## II. APPLICABLE LAW & SUBMISSIONS

### Leave to Appeal as of Right and Request for Extension of Time

6. The Government of Kenya submits that it was entitled to receive formal notification of the Decision (and the forthcoming Dissenting Opinion), having participated in the underlying proceedings at the request of the Chamber by making both written and oral submissions. In addition, the Decision significantly affects the interests of the Government of Kenya, in that its findings result in the Chamber requesting the assistance of the GOK in

<sup>8</sup> Rule 155 - Appeals that require leave of the Court, states:

1. When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision setting out the reasons for the request for leave to appeal.

2. The Chamber shall render a decision and shall notify all parties who participated in the proceedings that gave rise to the decision referred to in sub-rule 1.

<sup>9</sup> Leave to appeal may be granted for issues arising from the decision, which would significantly affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

ensuring the appearance of eight witnesses, using all means available under the laws of Kenya.<sup>10</sup>

7. Assuming the lack of notification was simply due to an oversight by the Chamber, the GOK then has standing to seek leave to appeal the Decision as a matter of right pursuant to Article 82(1)(d).<sup>11</sup> If this is the case, the Government requests a total of ten days to file its submissions from the date that it is served with the Decision and Dissenting Opinion.
8. The Trial Chamber has the discretion to vary the regular five-day time limit (imposed by Rule 155) where “good cause is shown”.<sup>12</sup> In this instance, there is good cause because the Government of Kenya has an interest in the proceedings, yet has a large docket and cannot exclusively devote its time and resources to responding to ICC issues. Therefore it is difficult for the Government to participate meaningfully within the short five-day time frame.<sup>13</sup> An extension of an additional five days will not unduly prolong the proceedings but will give the Government ample time to consider the issues and respond as necessary.

*Rule 103(1) Request to Make Submissions on Issues which Merit Leave to Appeal*

9. To the extent that the plain language of Article 82(1)(d) may be read strictly so as to preclude participants other than the “parties” – defined only as the

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<sup>10</sup> Decision, pg. 77.

<sup>11</sup> Article 82(1)(d): Appeal against other decisions reads:

(1) Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(d) 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 Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

<sup>12</sup> Regulation 35(2) of the Regulations of the Court.

<sup>13</sup> The Trial Chamber has previously implicitly acknowledged that the Government may require longer than the parties to file submissions. See ICC-01/09-01/11-1261-Conf, 7 April 2014 (giving the parties 18 days and the GOK 30 days to file).

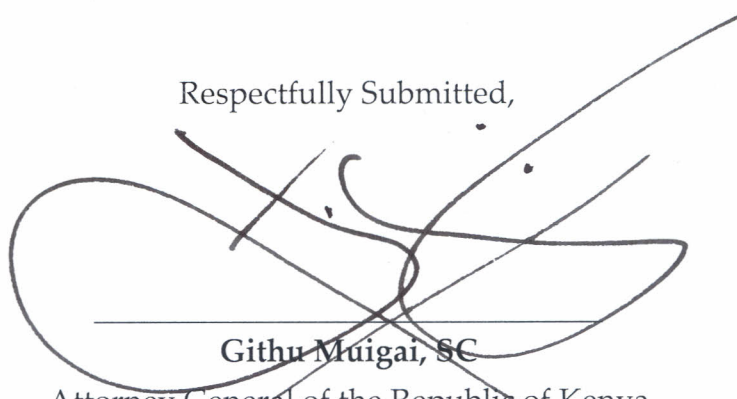
Prosecution and Defence – from filing requests for leave to appeal, the Government requests permission to file an *amicus curiae* submission outlining the issues which merit review by the Appeals Chamber.

10. Rule 103(1)<sup>14</sup> gives the Chamber discretion to invite or grant leave to a State to submit any observation on any issue that the Chamber deems appropriate. In this instance, the Chamber has already determined that because Kenyan law is “an important component of the present litigation”, the submissions of the GOK would be of assistance in determining whether national law prohibits the relief sought by the Prosecution.<sup>15</sup> Therefore, it is also logical that the views of the Government would be of assistance to the Chamber in assessing whether the Chamber correctly analysed the issues relating to national law in its Decision.

### III. RELIEF REQUESTED

11. The Government of Kenya respectfully requests that it be served the Decision and Dissenting Opinion, and that it be granted ten days to submit any issues which it deems fit for leave to appeal, either as a matter of right or as a friend of the Court.

Respectfully Submitted,



Githu Muigai, SC  
Attorney General of the Republic of Kenya  
Dated 25 April 2014  
At Nairobi

<sup>14</sup> Rule 103(1) – *Amicus Curiae* and other forms of submissions:

1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

<sup>15</sup> ICC-01/09-01/11-1165, para. 8.