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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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

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*

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Introduction

1. The Defence for Mr Ruto¹ and Mr Sang² seek leave to appeal the Trial Chamber's "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation".³ Mr Ruto puts forward three issues and Mr Sang puts forward six issues and nine sub-issues for consideration, some of which overlap with each other.

2. While the Prosecution agrees with the ultimate findings of the Trial Chamber,⁴ it acknowledges that two discrete issues arise from the Decision which meet the test in Article 82(1)(d) and merit appellate consideration at this stage. However, it disagrees with several of the issues and sub-issues as framed by Mr Ruto and Mr Sang (jointly, "the Defence"). As framed by the Defence, several of the matters they raise do not constitute appealable issues under Article 82(1)(d), either because they do not precisely describe the subjects that were essential for the determination of the matters in the Decision, or because they amount to arguments that could potentially be made on the merits of an appeal, if leave is granted.

3. Therefore, the Prosecution requests that the Trial Chamber re-frame the issues proposed by the Defence, and grant leave to appeal the following two issues which arise from the Decision ("Issues"):
 - a) 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 Issue"); and

 - b) Whether the Government of Kenya ("GoK") as a State Party to the Rome Statute can be obliged, under Article 93 and/or other sources of applicable

¹ ICC-01/09-01/11-1291 ("Ruto Application").

² ICC-01/09-01/11-1293 ("Sang Application").

³ ICC-01/09-01/11-1274-Corr2 ("Decision"). While the original decision was rendered on 17 April 2014, two further corrigenda were issued.

⁴ Decision, para.193.

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 Issue”).

4. Finally, the Prosecution opposes the GoK’s request for leave to appear as *amicus curiae* before the Trial Chamber on the question of whether to grant leave to appeal the Decision.⁵ The GoK fails to demonstrate that its submissions can meaningfully assist the Trial Chamber to decide if the criteria under Article 82(1)(d) are met for the issues proposed for appeal.

Procedural Background

5. On 17 April 2014, the Trial Chamber, by majority, summonsed eight Prosecution witnesses to testify before it via video-link or at a location in Kenya. It requested the GoK to ensure the appearance of the witnesses, using all means available under the laws of Kenya, including compulsory measures as necessary.⁶ On 29 April 2014, Judge Herrera Carbuca filed her dissent to the Decision.⁷
6. On 5 May 2014, the Defence for both Mr Ruto and Mr Sang filed applications for leave to appeal the Decision pursuant to Article 82(1)(d). Mr Ruto raises three issues, which he claims meet the standard for the grant of leave to appeal under Article 82(1)(d).⁸ Mr Sang identifies six purported issues (and nine associated sub-issues) for which he seeks leave to appeal.⁹
7. On 25 April 2014, the GoK filed a request for an extension of time of ten days to file its leave to appeal under Article 82(1)(d) or its leave to make submissions as *amicus curiae* under Rule 103(1).¹⁰ The Prosecution opposed this request, stating that while the GoK’s views on the correct analysis of its national law might assist

⁵ ICC-01/09-01/11-1304 (“GoK Request”).

⁶ Decision, Disposition.

⁷ ICC-01/09-01/11-1274-Anx.

⁸ Ruto Application, paras.6–29.

⁹ Sang Application, paras.3–25.

¹⁰ ICC-01/09-01/11-1277, para.5.

the Appeals Chamber on a potential appeal, they are unlikely to assist the Trial Chamber at the present time in determining the issues under Article 82(1)(d).¹¹ The Trial Chamber granted the GoK's request for additional time, and allowed the GoK to make an application either for leave to appeal or for leave to join as *amicus curiae* to any other request for leave to appeal, without prejudice to the Chamber's power to later decide on any such application.¹²

8. On 12 May 2014, the GoK filed a Request for leave to join as *amicus curiae*.¹³
9. Given the considerable overlap in the issues, the Prosecution now files its consolidated response to the two Defence Applications for leave to appeal the Decision and the GoK's Request for Leave to join as *Amicus Curiae*.

Submissions

- I. Response to Defence Applications for Leave to Appeal under Article 82(1)(d)
10. The Appeals Chamber has held that an issue under Article 82(1)(d) is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination.¹⁴ An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or a conflicting opinion.¹⁵ As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issues involved in the Decision meet the criteria set out in that provision.¹⁶

a) The Issues for which leave to appeal should be granted

¹¹ ICC-01/09-01/11-1284, paras.1-2, 13.

¹² ICC-01/09-01/11-1287, para.8.

¹³ GoK Request.

¹⁴ ICC-01/04-168 OA3, para.9. See also ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para.4, specifying that "[a] decision "involves" an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

¹⁵ *Ibid.*

¹⁶ ICC-02/04-01/05-20-US-Exp, para.22, unsealed pursuant to Decision ICC-02/04-01/05-52.

11. The Trial Chamber's decision to grant the Prosecution's application for witness summonses and request for State Party cooperation was premised on four main subjects or topics: (i) whether the Trial Chamber has the power to compel the testimony of witnesses; (ii) whether, pursuant to Articles 93(1)(d) and (l) of the Statute, the Trial Chamber can, by way of requests for cooperation, oblige Kenya both to serve summonses on witnesses and assist in compelling their attendance before the Chamber; (iii) whether Kenyan domestic law prohibits such a cooperation request; and, (iv) whether the Prosecution has justified the issuance of the summonses to compel the appearance of the eight witnesses.¹⁷
12. The Prosecution agrees with the Trial Chamber's conclusions that it had the power to compel the testimony of witnesses before it, to oblige Kenya as a State Party to serve summonses on witnesses and to assist in compelling their attendance before the Chamber, and that nothing in Kenyan national law prohibited it from carrying out the Chamber's orders. The Trial Chamber also correctly found that the issuance of the eight summonses was justified. Notwithstanding the Prosecution's agreement with these findings, it acknowledges that two Issues arise from the Decision which meet the test under Article 82(1)(d) and therefore should be certified for appeal.
13. Mr Ruto and Mr Sang put forward several issues (and sub-issues) which they submit constitute appealable issues under Article 82(1)(d). Considerable overlap exists between their issues, although articulated in different ways. However, some of the points they raise do not properly reflect issues which were essential for the determination of the Chamber. Others amount to potential arguments on the merits which could be made if leave to appeal is granted. The Trial Chamber should re-frame the issues raised by the Defence and grant leave to appeal the Decision only on the two Issues identified above. As discussed below, these two proposed Issues better reflect the basis for the Decision and, at the same time,

¹⁷ Decision, para.193.

encompass key aspects of the Defence Applications which merit leave to appeal.¹⁸ If the Chamber grants Mr Ruto and Mr Sang leave to appeal the Decision on the two proposed Issues, they will have the opportunity to present arguments on the merits of any appeal, including on some of the matters now incorrectly presented as issues for leave to appeal.¹⁹

The First Issue: 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

14. The Prosecution does not, in principle, oppose leave to appeal being granted on the first issues raised by Mr Ruto and Mr Sang,²⁰ each of which relate to the Court's power to compel the appearance of witnesses. However, since neither Accused correctly identifies the issues for appeal, the Prosecution proposes that they be re-framed.
15. Mr Sang's first issue is whether the ICC is competent to issue a subpoena to compel a witness to appear and testify before it.²¹ In a similar vein, Mr Ruto's first issue is whether the decision to compel the appearance of witnesses breaches the Court's obligations under Articles 21 and 22 of the Statute.²² The Prosecution proposes instead that the First Issue be phrased as "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".
16. The Prosecution's proposed wording for the First Issue better reflects an "issue" essential for the Chamber's determination so as to meet the test under Article 82(1)(d) and at the same time, is broad enough to cover the issues raised by both Mr Ruto and Mr Sang.

¹⁸ See Ruto Application, paras.6(i), 6(ii) and 6(iii); Sang Application, paras.3(i), 3(ii), and 3 (iii).

¹⁹ See Sang Application, paras.3(i)(a),3(i)(b),3(i)(c) and 3(i)(d); paras.3(ii)(a) and 3(ii)(b); para.3(iii)(a); paras.3(iv), 3(iv)(a) and 3(iv) (b).

²⁰ See Ruto Application, para.6(i); Sang Application, para.3(i).

²¹ Sang Application, para.3(i).

²² Ruto Application, para.6(i).

17. However, the alleged sub-issues raised in paragraphs 3(i)(a) and (i)(d) of Mr Sang’s Application—relating to whether “implied powers” can be the basis for the Chamber’s powers, and whether the Chamber was correct to rely on “good faith” as a basis for its Decision—do not raise appealable issues. Rather, they are more properly characterised as arguments that may be raised on appeal, if leave is granted.²³ Likewise, the content of paragraphs 3(i)(b) and (i)(c) of Mr Sang’s Application which challenge aspects of the Chamber’s reasoning on its powers under Article 93 may be more appropriately advanced in any eventual appeal, if leave is granted (relating to the Second Issue as below).²⁴ They do not constitute appealable issues *per se*.
18. In sum, the First Issue as proposed by the Prosecution meets the test under Article 82(1)(d). It correctly re-frames the first issues raised by Mr Ruto and Mr Sang by placing them more clearly in the context of a subject or topic arising from the Decision which was essential to the Chamber’s determination – namely, whether a Chamber has the power to compel witness appearance. If the Chamber grants leave to appeal on this First Issue, the matters raised as sub-issues in Mr Sang’s application could be brought as arguments in any eventual appeal;²⁵ however, in their current form, they do not meet the test for an appealable issue under Article 82(1)(d).

The Second Issue: Whether the Government of Kenya (“GoK”) 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

19. The Prosecution does not, in principle, oppose leave to appeal being granted on

²³ Sang Application, paras.3(i)(a) and (i)(d). *See for example*, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para.3, stating “[t]he word ‘decision’ refers to determinations or rulings made by a Pre-Trial or Trial Chamber, not to all statements that are made in the reasoning.”

²⁴ Sang Application, paras.3(i)(b) and 3(i)(c).

²⁵ See for example, Sang Application, paras.3(i)(a) and (i)(d).

the second and third issues raised by Mr Ruto and Mr Sang,²⁶ relating to the Court's power under Article 93 to oblige Kenya as a State Party to compel the appearance of witnesses before it (and whether Kenyan law prohibits such cooperation). However, the Prosecution proposes collapsing these four separate issues into a single broad issue, to accurately convey the principles underlying the Decision and to avoid fragmentation of key points which may be raised by the parties in any eventual appeal.

20. Mr Ruto's second issue is whether the Majority erred in finding that Article 93(1)(e) does not comprehensively address State Parties' obligations to facilitate the appearance of witnesses before the Court.²⁷ His third issue is whether the Majority erred in requiring a specific prohibition in domestic law indicating that Kenya's assistance in enforcing the ICC summons was prohibited.²⁸ Mr Sang's second issue is whether the ICC is competent to oblige a State Party to compel a witness to appear before it against his or her will.²⁹ His third issue is whether a request to the GoK to compel the appearance of a witness is prohibited by Kenyan law and the Rome Statute operating as part of Kenyan law.³⁰
21. The Prosecution proposes that the four separate questions raised by the Defence be captured in a single issue, "Whether the Government of Kenya ("GoK") 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".
22. While there is some merit in the second and third issues as framed by Mr Ruto and Mr Sang, they both fail to spell out the overarching subject or topic that

²⁶ Ruto Application, paras.6(ii) and 6(iii); Sang Application, paras.3(ii) and 3(iii).

²⁷ Ruto Application, para.6(ii).

²⁸ *Ibid.*, para. 6(iii).

²⁹ Sang Application, para.3(ii).

³⁰ *Ibid.*, para.3(iii).

constitutes the basis of the Decision, namely the Trial Chamber's powers under Article 93 to oblige Kenya as a State Party to serve the summonses and to assist in compelling the attendance of the witnesses before the Chamber. As currently framed, the Defence Applications scatter the substance of the single broad issue across several questions, which would not assist the Appeals Chamber to decide the merits of the appeal, if leave is granted.

23. The Prosecution's proposed Second Issue is broad enough to cover the matters raised by Mr Ruto and Mr Sang, while at the same time better reflects the "issue" which was essential for the Chamber's determination—namely, whether the Court has the power under Article 93 and/or other applicable law to oblige Kenya as a State Party to compel the appearance of witnesses before it. The Prosecution's proposed Second Issue also includes the question whether there is any specific prohibition in Kenyan national law.
24. However, the alleged sub-issues raised in paragraphs 3(ii)(a) and (b) and 3(iii)(a) of Mr Sang's Application relating to Article 70, retroactive penalties and differential treatment of States are not issues arising from the Decision. Rather, they may more properly be characterised as arguments that could be raised on appeal, if leave is granted.³¹
25. In sum, the Second Issue as proposed by the Prosecution meets the test under Article 82(1)(d). It would address the Trial Chamber's powers pursuant to Articles 93(1)(d) and 93(1)(l), considered in light of Article 93(1)(e)). It would also address the question of whether Kenya is obliged to serve and enforce a summons to a witness issued by the Court when its law does not specifically prohibit carrying out such orders. If the Chamber grants leave to appeal on this

³¹ Sang Application, paras.3(ii)(a), 3(ii)(b) and 3(iii)(a). *See for example*, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para.3, stating "[t]he word 'decision' refers to determinations or rulings made by a Pre-Trial or Trial Chamber, not to all statements that are made in the reasoning."

Second Issue, the matters raised as sub-issues in Mr Sang's Application³² could be brought as arguments in any eventual appeal; however, in their current form, they do not meet the test for an appealable issue under Article 82(1)(d).

b) Questions raised in the applications for which leave to appeal should be rejected

26. The fourth, fifth and sixth points advanced by Mr Sang³³ as appealable issues are mainly disagreements and grievances with the Decision and accordingly do not meet the criteria of Article 82(1)(d). Therefore, leave to appeal these points should not be granted.
27. In his fourth point, Mr Sang advances theoretical considerations on the "concept of complementarity" in the Rome Statute.³⁴ As the Appeals Chamber has held, an issue cannot "merely represent an abstract question or a hypothetical concern."³⁵ Moreover, the matters raised in paragraphs 3(iv)(a) and (b) pertain to statements made in the Chamber's reasoning, and not the Decision as such.³⁶ They do not therefore constitute "issues" under the terms of Article 82(1)(d).
28. In his fifth point, Mr Sang further disagrees with the Chamber's specific factual finding that the summonses to the eight witnesses are justified given their relevance, specificity and necessity.³⁷ This constitutes a mere disagreement on factual findings reached by the Chamber.³⁸ Similarly, in his sixth point, he challenges the Decision allowing the summons to Witness 15, despite his purported health problems.³⁹ This raises a matter that is extraneous to the core issues arising from the Decision. As a result, neither of these points constitutes appealable issues and leave to appeal should not be granted.

³² Sang Application, paras.3(ii)(a), 3(ii)(b) and 3(iii)(a).

³³ Sang Application, paras.3(iv), 3(v) and 3(vi).

³⁴ Sang Application, para.3(iv).

³⁵ ICC-01/05-01/08-532, para.17.

³⁶ ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para.3.

³⁷ Sang Application, para.3(v).

³⁸ ICC-01/04-168 OA3, para.9

³⁹ Sang Application, paras.3(v) and (vi).

c) *The two Issues, as reframed, meet the criteria for leave to appeal*

The two Issues significantly affect the outcome of the trial

29. According to the Appeals Chamber, under this limb the Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence.”⁴⁰ The outcome of the trial can be assumed to be affected “where the possibility of error in an interlocutory or intermediate decision may have a bearing” on the outcome of the trial.⁴¹
30. The Decision, in particular the Chamber’s determination of the two Issues, will allow the *viva voce* evidence of eight witnesses to be heard in this case. Since the Issues directly affect the scope of the evidence that will be available to the Trial Chamber when making its Article 74 determination, they can be said to significantly affect the outcome of this case.⁴² In particular, the Prosecution acknowledges that the possibility of an error at this stage could lead the Trial Chamber to hear the *viva voce* evidence of eight witnesses whose evidence *could* be excluded from the Chamber’s consideration.⁴³ Accordingly, the Issues can be said to significantly affect the outcome of the trial.
31. The Prosecution does not, however, agree with all of the Defence arguments on why the Issues affect the outcome of the trial. In particular, the Prosecution rejects Mr Ruto’s claim that the judgment *would* be based, in part, on evidence that should not have been before the Chamber.⁴⁴ Even if, *arguendo*, such evidence was obtained without any proper legal basis, it would not necessarily be excluded from the Chamber’s consideration. Article 69(7) sets a high threshold for the exclusion of evidence, namely that a violation casts substantial doubt on

⁴⁰ ICC-01/04-168 OA3, para.13.

⁴¹ ICC-01/09-01/11-912, para 65.

⁴² ICC-01/05-01/08-1169, para.35.

⁴³ Sang also similarly states that the ultimate outcome of the proceedings is largely dependent on whether or not the witnesses in question appear in court (see Sang Application, para.21).

⁴⁴ Ruto Application, paras.14, 24.

the reliability of the evidence or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

The two Issues significantly affect the fair and expeditious conduct of the proceedings

32. The two Issues also significantly affect the fair and expeditious conduct of the proceedings. They affect the fair conduct of the proceedings because they enable the Prosecution to elicit the *viva voce* testimony of eight witnesses that are central to its case, thereby enabling it to properly exercise its powers and fulfil its duties under Article 54,⁴⁵ and to present its case.⁴⁶ As a result, the scope and presentation of the Defence case would also be affected.⁴⁷
33. The Prosecution, however, disagrees with some of the Defence arguments on why the fairness of the proceedings would be affected. First, in arguing that the issues, unless resolved at this stage, would be unfair to the witnesses,⁴⁸ they speculate and wrongly assume that the witnesses were unaware that they could be called to testify before the Court. To the contrary, the witnesses were aware of the possibility they could be called to testify before the Court, and have only more recently expressed their unwillingness to do so. In any event, the witnesses' disagreement with the Chamber's procedures should not be a relevant consideration in assessing whether the Issues affect the fairness of the proceedings.
34. Second, in arguing that the issues, unless resolved at this stage, would be unfair to the GoK, Mr Sang wrongly points to the GoK's disagreement with the Chamber's findings on the nature of its pre-existing obligations as a State Party

⁴⁵ ICC-01/04-135-tEN, paras.38-39.

⁴⁶ ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para.24.

⁴⁷ The Defence similarly argues that fairness to the accused is a consideration. Sang Application, para.18; Ruto Application, para.15.

⁴⁸ Ruto Application, paras.16-17; Sang Application, para.18. The GoK's Request argues that fairness to witnesses would be affected, and should be dismissed for the same reasons: GoK Request, paras.20-21.

to the Statute.⁴⁹ This should not be a relevant consideration in assessing whether the Issues affect the fairness of the proceedings.

35. The two Issues as proposed by the Prosecution may also significantly affect the expeditious conduct of the proceedings. Chambers of this Court have previously found that the expeditious conduct of proceedings is at stake when an issue, such as the two proposed Issues, “may have an impact on how the Prosecution goes about selecting its witnesses [...]”;⁵⁰ may “affect in ‘a material way’ the Prosecutor’s ability to prove her allegations and ... have an impact on how she conducts her investigations”;⁵¹ or where “the introduction of evidence touching on the issue of the guilt or innocence of the accused may materially affect the content and the substance of the evidence introduced during the trial and its length, since this is likely to affect the nature and extent of the evidence called and the issues to be raised.”⁵²

36. However, the Prosecution disagrees with some of the Defence arguments on the effect on the expeditious conduct of the proceedings. In particular, while the presentation of the *viva voce* evidence of eight witnesses will necessarily require the GoK to take some practical steps to implement the Decision,⁵³ if carried out in good faith, these should not significantly affect the expeditious conduct of the proceedings.

Immediate resolution by the Appeals Chamber of the two Issues would materially advance the proceedings

37. The immediate resolution by the Appeals Chamber of the two Issues would

⁴⁹ Sang Application, para.18. The GoK’s Request raises the same argument, and should be dismissed for the same reasons: GoK Request, paras.22-24.

⁵⁰ ICC-01/04-01/07-116, p.6.

⁵¹ ICC-02/11-01/11-464, para.38.

⁵² ICC-01/04-01/06-1191, para.42.

⁵³ Ruto Application, paras.19-21; Sang Application, paras.19-20.

materially advance the proceedings.⁵⁴ As a result of its Decision—premised in particular on its resolution of the two Issues—the Chamber has found that it has the power to compel witnesses to appear before it and to oblige Kenya as a State Party to execute the summonses, if necessary by compulsion. Given the relevance and importance of the eight witnesses’ *viva voce* evidence to the Prosecution’s case, “prompt reference of the issue to the court of appeal”⁵⁵ and its “authoritative determination” would materially advance the proceedings by helping to ensure that proceedings move forward in the correct way.⁵⁶

38. The Appeals Chamber’s determination of the two Issues at this stage will help the proceedings “move forward’ by ensuring that the proceedings follow the right course”.⁵⁷ In addition, by “removing doubts about the correctness of a decision and mapping a course of action along the right lines,” the Appeals Chamber can provide “a safety net for the integrity of proceedings.”⁵⁸

II. Response to the GoK’s Request for Leave to Appear as *Amicus Curiae*

39. At the outset, the GoK’s requests for relief are procedurally flawed.
40. First, the GoK both seeks leave to appear as *amicus curiae* and at the same time makes its substantive submissions under Rule 103.⁵⁹ However, consistent with the jurisprudence of the Appeals Chamber, the GoK must first seek leave before filing its substantive submissions that are intended to assist the Chamber in the determination of the matter before it.⁶⁰ Second, the GoK’s submissions impermissibly argue the merits of the question before the Chamber, namely

⁵⁴ As the Prosecution agrees that immediate resolution of the Issues will materially advance the proceedings, it is unnecessary for it to address in detail some of the Defence arguments on expedition: Ruto Application, para. 28 and Sang Application, para.22. Nevertheless, the Prosecution considers that other Defence arguments are speculative in nature and should be dismissed: in particular, Ruto Application, para.27 and Sang Application, paras.23, 24.

⁵⁵ ICC-01/04-168 OA3, para.18.

⁵⁶ ICC-01/04-168 OA3, para.14.

⁵⁷ *Ibid.*, para.15.

⁵⁸ ICC-01/04-168 OA3, paras.14-15, 18.

⁵⁹ GoK Request, paras.25(i) and (ii).

⁶⁰ ICC-01/05-01/08-602 OA2, para.9.

whether leave to appeal should be granted. These arguments, apart from being unsupported, are premature. The Trial Chamber merely granted the GoK leave to make an application to become *amicus curiae*. It did not at this stage allow it to make submissions on the merits of the question before the Chamber.⁶¹

41. Even if the Trial Chamber entertains the GoK's request despite its procedural irregularities, the GoK also fails to demonstrate why its submissions as *amicus curiae* would be desirable for the proper determination of the case in the sense that they would meaningfully assist the Trial Chamber to decide whether to grant leave to appeal. In large part, the GoK's submissions merely repeat the Defence Applications and do not demonstrate what value the GoK can bring as *amicus curiae*. In addition, the GoK fails to substantiate its claims on why it is desirable to hear their views as *amicus curiae* at this stage of the proceedings. For these reasons, GoK's request for leave to be *amicus curiae* should be denied.
42. The Chamber has the discretion to grant leave to the GoK to appear as *amicus curiae*, based on the nature and value of their submissions to the issues raised by the parties and to be determined by the Chamber.⁶² The role of an *amicus curiae* at this stage of this case should be confined to assisting the Trial Chamber in framing the issues for appeal as raised by the parties, and in determining whether those issues meet the criteria for leave to appeal under Article 82(1)(d). An *amicus* must not merely repeat views already expressed by the parties,⁶³ but rather should put forward a different and independent perspective⁶⁴ on the matters before the Chamber.⁶⁵
43. The GoK's Request fails to demonstrate why it should be permitted to appear as *amicus curiae* at this stage of the proceedings. First, the GoK's Request is closely

⁶¹ ICC-01/09-01/11-1287, para.8. See also GoK Request, para.3.

⁶² ICC-01/04-01/06-1289 OA11, para.8; ICC-02/05-01/09-51 OA, para.7; ICC-01/09-01/11-942 OA5, para.9; ICC-01/05-01/08-602 OA2, para.10; ICC-02/11-01/11-533, OA5, para.12, ICC-01/05-01/08-602 OA2, para.11.

⁶³ ICC-01/05-01/08-602 OA2, para.11; ICC-02/11-01/11-533, OA 5, para.12.

⁶⁴ ICC-02/05-01/09-51 OA, para.9.

⁶⁵ ICC-02/11-01/11-517 OA5, para.10.

allied to the Defence Applications and many of its submissions merely repeat the Defence's submissions.⁶⁶ Indeed, the GoK states that it "agrees that the issues identified by the Defence in their respective applications arise from the decision and merit leave to appeal".⁶⁷ From among the issues raised by the Defence, the GoK highlights three matters which it claims were essential to the Chamber's Decision, relating to its determination of Kenyan national law and its powers to impose obligations on Kenya.⁶⁸ In addition, all the matters raised by the GoK can be subsumed within the two appealable Issues advanced by the Prosecution. The GoK, apart from indicating that it has a vested interest in the resolution of the merits of those issues⁶⁹ and its disagreement with the Decision,⁷⁰ does not show that it could add a new perspective on why these issues meet the criteria for leave to appeal.

44. Second, the GoK fails to substantiate in any manner why it would be desirable to hear from it as *amicus* at this stage. It argues that its observations "would assist the Chamber to better appreciate the (*sic*) some issues of concern arising from the Trial Chamber's decision."⁷¹ However, apart from making bald assertions that such concerns exist, the GoK does not substantiate its claims or explain why these concerns are relevant to the Chamber's determination of the matter before it, as opposed to the merits of any eventual appeal if leave were to be granted.⁷²
45. While the GoK claims that it is "best placed to explain to the court how questions of fairness and expeditiousness play out in the national Kenyan context and legal

⁶⁶ See ICC-01/05-01/08-602 OA2, para. 11.

⁶⁷ GoK Request, para.19.

⁶⁸ GoK Request, para.19.

⁶⁹ GoK Request, paras.15-18.

⁷⁰ GoK Request, paras.6, 9-11.

⁷¹ *Ibid.*, para. 4.

⁷² See for example: GoK Request, para.6, where the GoK raises "serious concerns" on the Chamber's analysis of the relevant legal instruments under international and domestic law to bind the GoK as a State Party to compel witnesses to testify before the Court; para.9 where the GoK takes issue with the aspects of the Decision obliging it to compel unwilling witnesses to appear; paras.10-11, where the GoK states that special arrangements for the security of the eight summonsed witnesses were not justified contrary to the Decision; paras.7-8, 12 where the GoK raises questions, relating to practical aspects of the execution of an individual summons.

system,”⁷³ its submissions either merely repeat the Defence Applications, or are unsubstantiated.⁷⁴ The GoK bears the burden of demonstrating that its intervention as *amicus curiae* at this stage of the proceedings would be desirable – but it fails to do so.

46. The GoK also states without further elaboration that it should participate as *amicus* because (i) it has participated substantively in both the written and oral proceedings forming the basis of the Decision; (ii) its assistance and cooperation are “essential, indeed critical and indispensable”, to the successful implementation of the Decision; and (iii) it is desirable to hear from a State Party on the novel issue arising from the Decision, namely the cooperation of a State Party in compelling witness testimony.⁷⁵ However, based on the GoK’s own submission, the Chamber will be unable to properly assess the quality of its intended contribution as *amicus curiae* and whether it is desirable to hear from them at this stage of the proceedings.
47. Finally, the GoK is also mistaken when it requests in its relief leave from the Trial Chamber to file *amicus* submissions in the respective appeals.⁷⁶ That will be a matter for determination by the Appeals Chamber, not the Trial Chamber. Similarly, it is not for the Trial Chamber to grant suspensive effect to the Decision, even if it grants leave to appeal. Therefore, the submissions of the GoK to that effect should likewise be disregarded.⁷⁷
48. In sum, the GoK has failed to demonstrate that it can contribute as *amicus curiae* to meaningfully assist the Trial Chamber to determine whether to grant leave for an interlocutory appeal against the Decision. The GoK Request should therefore

⁷³ GoK Request, para.17.

⁷⁴ GoK Request, paras.20-24; See also paragraphs 33 and 34, footnotes 48 and 49 above. Based on the GoK Request, it is unclear if the GoK has a view and can contribute to the determination of the other technical criteria under Article 82(1)(d), namely, the effect on the outcome of the trial and if the immediate resolution of the issues will materially advance the proceedings. The GoK Request fails to address these matters.

⁷⁵ GoK Request, paras.15-18.

⁷⁶ GoK Request, para. 25(iii).

⁷⁷ GoK Request, para.12.

be denied.

Conclusion and relief sought

49. Although the Prosecution agrees with the Trial Chamber's ultimate findings in the Decision, it acknowledges that two discrete Issues arise from the Decision which meet the test under Article 82(1)(d).
50. Accordingly the Prosecution does not in principle oppose the requests by Mr Ruto and Mr Sang for leave to appeal the Decision but asks the Chamber to reframe the issues as follows:
- a) 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; and
 - b) Whether the Government of Kenya as a State Party 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.
51. With respect to all other issues and sub-issues that do not fall within the scope of the Issues as reframed, the Defence Applications should be denied.
52. The GoK's Request for leave to join as *amicus curiae* should also be denied.



Fatou Bensouda, Prosecutor

Dated this 16th day of May 2014
At The Hague, The Netherlands