



Original: English

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

Date: 11 July 2014

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

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

Public

**Clarification to the Government of the Republic of Kenya's
Observations under Rule 103 in relation to the
Defence Appeal against 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)**

**The Office of Public Counsel for
Victims**

Mr Orchlon Narantsetseg

**The Office of Public Counsel for the
Defence**

States' Representatives

Mr Githu Muigai, SC
Attorney General, Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Government of the Republic of Kenya was granted leave to submit observations pursuant to **Rule 103(1)**¹ of ICC Rules, on the Second Issue certified for appeal in relation to the *Decision on Prosecutor's Application and Resulting Request for State Party Cooperation*.² The Government submitted its observations on 25 June 2014,³ and at paragraph 16 partially addressed the question of **Section 80** of Kenya's International Crimes Act ('the Act') in relation to **Article 93(1)(b)** of the Rome Statute.
2. The Government of the Republic of Kenya understands that the Chamber has the discretionary power to accept clarifications or additional details on any document, pursuant to **Regulation 28** of the Regulations of the Court,⁴ or in the interests of justice.
3. This is the first time that the Government has been asked to interpret these portions of its Act. Therefore, the Government of the Republic of Kenya seeks the opportunity to make clarified observations in relation to **Section 80** as follows.
4. The Government of the Republic of Kenya's initial submissions at paragraph 16 were in direct response to Prosecution submissions discussing only **Section 80(1) and (2)**,⁵ which do seem to suggest that Kenyan law applies for the purpose of the taking of evidence pursuant to **Article 93(1)(b)**. But this applies only to the procedural aspects of such a hearing.

¹ ICC-01/09-01/11-1350, 10 June 2014.

² ICC-01/09-01/11-1274-Corr2, 17 April 2014.

³ ICC-01/09-01/11-1406, 25 June 2014.

⁴ Regulation 28(1): A Chamber may order the participants to clarify or provide additional details on any document within a time limit specified by the Chamber.

⁵ ICC-01/09-01/11-1202, 4 March 2014, paras. 22-23.

5. If one reads further, with regard to the compellability of a witness to give evidence, **Section 80(4)** brings the question back within the ambit of what is allowed under the Rome Statute, rather than Kenyan law:

'(4) Notwithstanding subsection (1), a person who is required under section 78 or 79 to give evidence, or to produce documents or other articles, is not required to give any evidence, or to produce any document or article, that the person could not be compelled to give or produce in the investigation being conducted by the Prosecutor or the proceedings before the ICC.'

6. Therefore, if witnesses cannot be compelled to give evidence under the Rome Statute, then Section 80 does not provide a way around the voluntariness requirement. The Prosecution is clearly mistaken in its submissions that under **Section 80** of the International Crimes Act witnesses can be compelled.

Respectfully Submitted,



Githu Muigai, SC

Attorney General of the Republic of Kenya

Dated 11 July 2014

At Nairobi, Kenya