

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 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

Prosecution response to the Government of Kenya's "Clarification" to its Observations on the appeals against the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", and request for dismissal *in limine*

Source: Office of the Prosecutor

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Court to:

The Office of the Prosecutor

Ms. Fatou Bensouda, Prosecutor

Mr. James Stewart

Ms. Helen Brady

Counsel for William Samoei Ruto

Mr. Karim Khan

Mr. David Hooper

Ms. Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr. Joseph Kipchumba Kigen-Katwa

Ms. Caroline Buisman

Legal Representatives of Victims

Mr. Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

Ms. Paolina Massidda

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

States Representatives

Mr. Githu Muigai

Attorney-General, Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

Introduction

1. One week after the Appeals Chamber rejected applications by the Defence for Mr. Ruto and Mr. Sang to file additional remarks supporting their appeals under Regulation 28 of the Regulations of the Court,¹ the Government of Kenya (“GoK”) now seeks to do the same.² Yet since the Motion misapprehends the procedures of this Court, it should be dismissed *in limine*. Invited to make limited observations in these appeals under Rule 103, the GoK should not be permitted to circumvent the general restriction on the filing of replies in support of an interlocutory appeal any more than a Party.

Submissions

2. The Appeals Chamber should dismiss the Motion *in limine* because it amounts to an impermissible reply in support of the GoK’s observations under Rule 103.³

3. The GoK’s contention that “the Chamber has the discretionary power to accept clarifications or additional details on any document”, whether under Regulation 28(1) or “in the interests of justice”,⁴ misapprehends the established procedures of this Court.⁵ Mischaracterisation of the Court’s discretion to “order”⁶ clarifications or further submissions as a general discretion to *receive* additional filings is more than merely unfortunate drafting—it frustrates the very judicial economy which Regulation 28 is intended to promote. Nor can such a practice be “in the interests of justice”, which favour fair, just, and expeditious proceedings.⁷ The GoK’s approach

¹ See ICC-01/09-01/11-1417 OA7 OA8 (“Regulation 28 Decision”). See also ICC-01/09-01/11-1404 OA7 OA8 (“Mr. Ruto’s Regulation 28 Motion”); ICC-01/09-01/11-1408 OA7 OA8; ICC-01/09-01/11-1409 OA7 OA8 (“Mr. Sang’s Regulation 28 Motion”); ICC-01/09-01/11-1410 OA7 OA8.

² ICC-01/09-01/11-1431 OA7 OA8 (“Motion”).

³ Replies in support of an interlocutory appeal are not permitted: see ICC-01/05-01/08-1846 OA9, para.6; ICC-01/09-02/11-206 OA, para.8; ICC-01/09-01/11-239 OA, para.8; ICC-01/04-01/07-148 OA, para.3; ICC-01/04-01/06-424 OA3, para.5.

⁴ Motion, para.2, fn.4.

⁵ *Contra* Motion, para.2.

⁶ See Regulations 28(1), 28(2) (emphasis added).

⁷ The Prosecution further notes that Regulation 28(3), upon which the GoK is understood to rely by its reference to the “interests of justice”, in fact refers to the “inherent powers of the Chamber”.

serves none of these values, instead enabling the Parties to file speculative additional filings in the hope that the Court may choose to receive them. This approach should be firmly discouraged.

4. The Motion also warrants rejection *in limine* because—notwithstanding the clear terms of Regulation 28, and unlike the recent approach of the Defence for Mr. Ruto and Mr. Sang⁸—it does not even clearly seek the Appeals Chamber’s leave to file its purported clarification.⁹ This approach disregards the Appeals Chamber’s specific admonition to the Parties not to use the GoK’s observations as a covert means “to reply to each other.”¹⁰ The GoK should be held to no lesser standard *vis-à-vis* the Parties’ responses to its observations.

5. The “clarification” provided by the GoK is in any event unjustified.¹¹ The Appeals Chamber invited the GoK to make such “concise and focussed” observations as it saw fit on the general question whether the GoK is obliged “to cooperate with the [C]ourt to serve summonses and assist in compelling the appearance of witnesses”.¹² To the extent section 80 of Kenya’s *International Crimes Act* (“ICA”) is relevant to that question, the GoK had full opportunity to address it—as indeed it concedes it did with respect to sections 80(1) and (2).¹³ The precise meaning of the GoK’s statement that “[t]his is the first time that the Government has been asked to interpret these portions of its Act” is unclear, yet represents little justification given the express terms of the Appeals Chamber’s original invitation.¹⁴ Moreover, as the Appeals Chamber recently held, “it was foreseeable that arguments

⁸ See e.g. Mr. Ruto’s Regulation 28 Motion, paras.1, 8; Mr. Sang’s Regulation 28 Motion, paras.1, 13 (seeking leave to address a specific issue under Regulation 28).

⁹ See Motion, para.3 (noting that the GoK “seeks the opportunity to make clarified observations”). *But see* paras.4-6 (making those substantive observations without the requisite leave). See also ICC-01/04-01/06-824 OA7, para.68 (disapproving of the practice of filing substantive replies prior to the grant of leave by the Appeals Chamber, “which in and of itself may also give rise to the rejection of an application for leave”).

¹⁰ ICC-01/09-01/11-1350 OA7 OA8 (“Rule 103 Decision”), para.8.

¹¹ Nor indeed does the GoK even attempt to make any representation as to why the Appeals Chamber should grant the necessary leave for its purported clarification.

¹² Rule 103 Decision, paras.1, 8.

¹³ *Contra* Motion, para.4.

¹⁴ *Contra* Motion, para.3.

concerning article 93(1)(b) of the Statute would be made before the Appeals Chamber, considering that this provision was relied upon and addressed both during trial and appeal proceedings.”¹⁵

6. Finally, since the question whether witnesses can “be compelled to give evidence under the Rome Statute”¹⁶ is not an issue on which the GoK has been invited to make observations,¹⁷ its remarks—premised on a particular and strained interpretation of the Statute—do not assist the Appeals Chamber, and certainly do not justify the conclusion that “[t]he Prosecution is clearly mistaken in its submissions”.¹⁸ Indeed, to the contrary, the GoK concedes that the Prosecution is correct in its assertion that sections 80(1) and (2) of the ICA “do seem to suggest that Kenyan law applies for the purpose of the taking of evidence pursuant to Article 93(1)(b).”¹⁹

Conclusion

7. The Motion should be dismissed *in limine*, and the Appeals Chamber should not consider it in weighing the merits of these appeals.



Fatou Bensouda, Prosecutor

Dated this 15th day of July 2014

At The Hague, The Netherlands

¹⁵ Regulation 28 Decision, para.13.

¹⁶ See Motion, para.6. The Prosecution recalls its previous remarks that these appeals concern compelled *appearance* to testify, not compelled testimony in the sense of Rule 65. See ICC-01/09-01/11-1380-Corr (“Prosecution Consolidated Response”), fn.13, and para.20.

¹⁷ See Rule 103 Decision, para.8.

¹⁸ *Contra* Motion, para.6.

¹⁹ See Motion, para.4. See further *e.g.* Prosecution Consolidated Response, paras.74-75.