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

Date: **1 October 2015**

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Péter Kovács

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

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

Public

**Prosecution's Response to the Government of the Republic of Kenya's Request to
Participate as *Amicus Curiae* in the Appeal concerning the
"Decision on Prosecution Request for Admission of Prior Recorded Testimony"
(ICC-01/09-01/11-1972)**

Source: Office of the Prosecutor

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Ms Fatou Bensouda, Prosecutor

Mr James Stewart

Ms Helen Brady

Counsel for William Samoei Ruto

Mr Karim Khan

Mr David Hooper

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Ms Caroline Buisman

Legal Representatives of Victims

Mr Wilfred Nderitu

Office of Public Counsel for Victims

Ms Paolina Massidda

Office of Public Counsel for Defence**States' Representatives**

Mr Githu Muigai

Attorney-General, Republic of Kenya

Amicus Curiae**REGISTRY**

Registrar

Mr Herman von Hebel

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations Other
Section**

Introduction

1. The Government of the Republic of Kenya's request for leave, under rule 103(1) of the Rules of Procedure and Evidence, to participate in this appeal as *amicus curiae* should be rejected.¹ The Request relates only to the first issue certified for appeal,² which is:

Whether the amended Rule 68 of the Rules can be applied in this case without offending Articles 24(2) and 51(4) of the Statute.³

2. The Government of Kenya's observations will not assist the Appeals Chamber in this determination, which is fundamentally a question of law. The Government of Kenya is no better placed than the Parties and participants, and indeed the Appeals Chamber itself, to analyse the relevant factors for that purpose. To the extent the Government of Kenya wishes to give its understanding of historical diplomatic negotiations, this amounts to giving evidence 'from the bar' rather than a legal "observation" permitted by rule 103(1), and is not desirable for determination of this case.

Submissions

3. None of the arguments presented in the Request shows that it would be "desirable for the proper determination" of this appeal to hear the Government of Kenya's observations.⁴ The Request thus argues that:

¹ See ICC-01/09-01/11-1972 ("Request"). By decision of 29 September 2015, the Appeals Chamber granted leave to the Parties to respond to the Request: ICC-01/09-01/11-1975 OA10, para. 5.

² See Request, paras. 1, 6, 14, 16.

³ ICC-01/09-01/11-1953-Red-Corr, para. 20.

⁴ See Rules, rule 103(1). See also ICC-01/09-01/11-1350 OA7 OA8 ("*Ruto and Sang* Rule 103 Decision"), para. 7 (recalling that the "decision pursuant to rule 103 (1) [...] is discretionary").

- the Government of Kenya “actively participated” in the “negotiations leading up to the adoption of the amended Rule 68” and “has important observations to make” on this process;⁵
- the Government of Kenya has a “longstanding commitment” to the Court;⁶ and
- the Government of Kenya is “obligated to ensure” that Mr Ruto and Sang, who are citizens of Kenya, “have been subjected to the full protection of the law” in the Statute and the Rules” and that the appeal may thus possibly have a “significant impact on the fundamental human rights” of Mr Ruto and Mr Sang.⁷

4. Whereas the Prosecution has previously agreed that it may be appropriate for a State Party to participate as an *amicus curiae* when the obligations of the State Party under the Statute are the object of dispute,⁸ this is distinct from the present circumstances in which the State Party seeks to intervene primarily on the basis of its national interests (to articulate its understanding of diplomatic negotiations in which it participated, and to intervene on behalf of its citizens). A State or organisation intervening on this basis, no matter how well-intentioned, is not acting as a ‘friend of the court’, as envisioned in rule 103(1), and hence its observations are not desirable for the determination of the case.

5. In the remainder of this response, the Prosecution addresses the three specific assertions made by the Government of Kenya.

⁵ See Request, paras. 7-8. See also para. 14 (suggesting that the Government of Kenya may “assist the Appeals Chamber in appreciating the context in which the Assembly [of States Parties] adopted the amended Rule 68”).

⁶ Request, para. 14. See further paras. 9-13.

⁷ Request, para. 15.

⁸ *Ruto and Sang* Rule 103 Decision, para. 7 (noting that “all parties agree that Kenya’s Request for Leave to File Amicus Observations should be granted”). See also ICC-01/09-01/11-1342, para. 3.

The views of the Government of Kenya on diplomatic negotiations are not desirable for the proper determination of this case

6. Applying a test substantially similar to rule 103(1),⁹ the ICTY has stressed that intervention as an *amicus curiae* “is not intended to serve as a vehicle for the presentation of new evidence on appeal.”¹⁰ The Prosecution submits that this insight should be no less relevant to this Court in determining the kinds of observations which might be “desirable” for the determination of the cases before it.

7. By proposing to submit observations “regarding the negotiations leading up to the adoption of the amended Rule 68”,¹¹ the Government of Kenya seeks to present the Appeals Chamber with information of an essentially evidentiary nature. This is not desirable for the determination of this appeal.¹² Thus, the Government of Kenya does not propose to make observations on the legal relationship between the provisions relevant to the first issue, or the text of the provisions themselves, or even the implications of the possible interpretations of those provisions in light of the object and purpose of the Statute. Rather, it seeks only to inform the Appeals Chamber of its understanding of the *circumstances* of the negotiations leading to one of those provisions.

⁹ See ICTY, Rules of Procedure and Evidence, IT/32/Rev.50, 8 July 2015, available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf (accessed 30 September 2015), rule 74 (“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 appear before it and make submissions on any issue specified by the Chamber”, emphasis added).

¹⁰ ICTY, *Prosecutor v. Gotovina & Markač*, IT-06-90-A, Decision on Application and Proposed *Amicus Curiae* Brief, 14 February 2012, available at <http://www.icty.org/x/cases/gotovina/acdec/en/120214.pdf> (accessed 30 September 2015), para. 11. See also ICTY, Information Concerning the Submission of *Amicus Curiae* Briefs, IT/122, 27 March 1997, available at http://www.icty.org/x/file/Legal%20Library/Miscellaneous/it122_amicuscuriae_briefs_en.pdf (accessed 30 September 2015), para. 5(b) (“In general, *amicus* submissions shall be limited to questions of law, and in any event may not include factual evidence relating to elements of a crime charged”); ICTY, *In the Case Against Florence Hartmann*, IT-02-54-R77.5-A, Decision on Application for Leave to File *Amicus Curiae* Brief, 5 February 2010, available at http://www.icty.org/x/cases/contempt_hartmann/acdec/en/100205.pdf (accessed 30 September 2015), para. 5.

¹¹ See Request, paras. 7-8.

¹² *Contra* Request, para. 8.

8. The Prosecution acknowledges that such circumstances, in the context of article 32 of the Vienna Convention on the Law of Treaties, may, potentially, be one area into which the Parties may inquire during the appeal, even though the matter is not dispositive. Yet even if this is so, a submission under rule 103 is not the appropriate procedure for such information to be received at the Court. An inquiry into the preparatory work of a treaty, or similar agreement, should aspire to a comprehensive view of the different positions expressed, and should not give greater prominence to one view over another.¹³ To the extent that one State Party involved in diplomatic negotiations is invited to make observations under rule 103, the same invitation should be extended to other States Parties likewise involved. Such a procedure is not only unnecessary but unwieldy.

9. Consistent with these principles, it is noteworthy that the Trial Chamber—in a decision unacknowledged in the Request—rejected the Government of Kenya’s very similar application to participate in the proceedings leading to the decision under appeal. In the context of the concerns just outlined, the Trial Chamber’s reasoning, stressing that the proposed observations were “neither necessary *nor appropriate*” for “*the legal* interpretation and application of Rule 68” is instructive.¹⁴ The Appeals Chamber is urged now to adopt the same view.

The Government of Kenya’s “longstanding commitment” to the Court is irrelevant

10. The emphasis by the Government of Kenya of its commitment to the Court, although welcome,¹⁵ cannot be relevant to the decision whether to grant leave to intervene as an *amicus curiae*, and should be disregarded.¹⁶

¹³ See Request, paras. 7-8 (emphasising the Government of Kenya’s “active participat[ion]” in those negotiations).

¹⁴ See ICC-01/09-01/11-1893, para. 4 (emphasis added).

¹⁵ But see also e.g. ICC-01/09-02/11-1033 (inviting further submissions in the *Kenyatta* case concerning the Prosecution’s request under article 87(7) of the Statute).

¹⁶ *Contra* Request, para. 14.

11. The equal opportunity given in rule 103(1) to “a State, organization, or person” confirms that leave to participate as an *amicus curiae* is neither an entitlement nor a reward. This follows from the fact that, unlike States, neither an “organization” nor a “person” will commonly bear obligations under the Statute, and yet they are treated in full equality with States under rule 103(1). Nor, similarly, is rule 103(1) confined only to States Parties but rather applies to all States.

12. For this reason, Kenya’s ratification of the Statute,¹⁷ “longstanding cooperation relationship” with the Court,¹⁸ “fully paid up” contribution to the running of the Court,¹⁹ enactment of “domestic implementing legislation”,²⁰ and compliance with its obligation under article 86 of the Statute²¹ are irrelevant to the Request.

13. Furthermore, as the Government of Kenya rightly acknowledges, cooperation with the Court is not “a matter of convenience but [...] a matter of responsibility”.²² It is important not to tarnish the laudable discharge of this responsibility with any sense that a State may be permitted to intervene in a particular case as a matter of *quid pro quo*.²³

The rights of the accused persons are protected by the Court

14. Participation in this appeal by the Government of Kenya is unnecessary to protect the rights of Mr Ruto or Mr Sang, and is likewise irrelevant to the Request.²⁴ Nor in any event does the Government of Kenya explain how its proposed observations would indeed further the protection of the rights of the Accused. To the contrary, the Statute itself is premised on the ability of the Accused themselves,

¹⁷ Request, para. 9.

¹⁸ Request, para. 9.

¹⁹ Request, para. 9.

²⁰ Request, para. 10.

²¹ Request, para. 11.

²² Request, para. 13.

²³ See Statute, arts. 40(1), 74(2).

²⁴ *Contra* Request, para. 15.

through Counsel, to present arguments in their defence and to seek the assistance of the Court in preserving their rights, as may be required. They require no assistance from an *amicus curiae* in that regard.

15. Within this framework, it is this Court which holds the right and duty to ensure that persons appearing before it receive “the full protection of the law”. Although it may be assisted by the arguments of the Parties and participants, the Court can neither abdicate this prerogative nor accept the vague assertion that those persons’ human rights may be protected only by an external intervention.

16. Indeed, since the States Parties through the Statute mandated the Court to act “consistent[ly] with internationally recognized human rights” and to guarantee the accused “a fair hearing”,²⁵ States Parties—including the Government of Kenya—have already taken a substantial step to discharge their general obligation to ensure the fairness of the Court’s proceedings, not only *vis-à-vis* their own citizens but to all. States Parties also continue to play an active role in ensuring the Court’s independence and fairness through means including the election of the Judges of the Court, and other senior Court officials.

²⁵ See Statute, arts. 21(3), 67(1).

Conclusion

17. For the reasons above, the Request should be denied.

Word count: 2,008²⁶



Fatou Bensouda, Prosecutor

Dated this 1st day of October 2015

At The Hague, The Netherlands

²⁶ The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.