

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No. **ICC-01/09-01/11 OA 10**

Date: **26 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

**Sang Defence Response to the African Union's *Amicus Curiae* Observations
on the Rule 68 Amendments at the Twelfth Session of the Assembly of States Parties**

Source: Defence for Joshua arap Sang

Document to be notified in accordance with regulation 31 of the *Regulations of the Court*
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REGISTRY

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1. The Defence for Mr Joshua arap Sang (the 'Defence') hereby makes the following brief response to the *amicus curiae* observations ('Observations') filed by the African Union Commission (the 'AUC')¹ in relation to the Defence's appeal against the Trial Chamber's "Decision on Prosecution Request for Admission of Prior Recorded Testimony" (the 'Impugned Decision').²
2. The AUC's Observations focused solely on the First Issue on appeal, namely whether Rule 68 of the Rules of Procedure and Evidence, as amended at the Twelfth Session of the Assembly of States Parties (the 'ASP'), can be applied in this case without offending Articles 24(2) and 51(4) of the Rome Statute. The AUC concludes that the Impugned Decision violates several fundamental provisions of the Statute including Articles 24(2), 51(4) and 67.
3. The Defence submits that the AUC's observations as to the understanding of several African States Parties at the ASP are particularly relevant, insightful, and significant. The AUC explained that representatives of the Governments of Kenya, Nigeria, and South Africa, all made statements before the Assembly regarding the non-retroactivity of the rule amendment, and there was no negative reaction or opposition to this statement.³ The fact that the audio recording of the Plenary (Formal) Session of the Working Group on Amendments on 27 November 2013 has captured the Kenyan representative of expressly stating that she "welcome[s] the assurances that precede the draft resolution and in particular the non-retroactivity of this Rule, in respect of the trials that may be ongoing", and the fact that there was no response to the contrary, is highly indicative of the existence of an assurance made to the Government of Kenya, and known to other States, by an officer of the Court or the Prosecution that Rule 68 as amended would not be used in the Kenyan Situation.
4. This recorded statement comports with assertions made by the Government of Kenya (the 'GOK') in its two requests to submit Rule 103(1) observations. The

¹ ICC-01/09-01/11-1988.

² ICC-01/09-01/11-1938-Conf-Corr.

³ Observations, paras 58-61.

GOK sought leave to submit observations as to the understanding that was reached by the Assembly in regard to the implication of the amendment of Rule 68 on the on going cases before the ICC,⁴ as well as the context and scope of the Rule 68 amendment,⁵ which led to the amendment being adopted by consensus. These requests by the GOK were denied by the Trial Chamber⁶ and the Appeals Chamber⁷.

5. The statements highlighted by the AUC must also be viewed in light of Judge Sanji Monageng's request to recuse herself from participating in this appeal.⁸ The Presidency has cited Judge Monageng's request as being based upon the following reasons:

"The reason for this request centres on allegations reported in various news articles about assurances given by Court officials, prior to the adoption of the proposed amendment to rule 68 of the Rules of Procedure and Evidence, by the Assembly of States Parties (ASP) at its Twelfth Session held in November 2013. The alleged assurances concern the non-retroactive application of the rule change to the Kenyan cases. While I consider these allegations to be entirely without foundation or merit, it is my considered opinion that my discussions with various states parties on the proposed amendment in the process leading up to its adoption may be construed as having a bearing on this appeal. This is because one of the issues on appeal relate to the Trial Chamber's finding that the principle of non-retroactivity does not apply to this particular rule change. Accordingly, I request to be excused from the present appeal ahead of any concerns being raised as to my impartiality."

6. While the Defence is not in a position to verify what transpired in the negotiations between States Parties and officers of the Court or the Prosecution during the Twelfth Assembly of States Parties, the Defence submits that the observations of the AUC and the other comments on record regarding how consensus to adopt the Rule 68 amendment was reached, this should, in its totality and in the interests of justice, give the Appeals Chamber pause when determining the applicability of the Rule 68 amendment to this case.

⁴ ICC-01/09-01/11-1891, paras. 3-5.

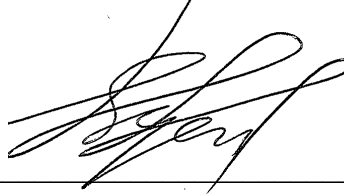
⁵ ICC-01/09-01/11-1972, para. 14.

⁶ ICC-01/09-01/11-1893.

⁷ ICC-01/09-01/11-1987.

⁸ ICC-01/09-01/11-1968-Anx.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Joseph Kigen-Katwa', written over a horizontal line.

Joseph Kipchumba Kigen-Katwa
On behalf of Joshua arap Sang
Dated this 26th day of October 2015
In Nairobi, Kenya

Word count: 892