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

Date: 1 September 2013

THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Cuno Tarfusser, Second Vice-President

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

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

Public

**Defence Application to Vacate the Decision of the Plenary of Judges on the “Joint
Defence Application for a Change of Place where the Court Shall Sit for Trial”**

Source: Defence for Mr. William Samoei Ruto

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

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**Unrepresented Applicants
(Participation/Reparation)**

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**Victims Participation and Reparations
Section**

**Other
Trial Chamber V(A)**

1. On 11 July 2013, a Plenary of Judges of the International Criminal Court (“ICC”) failed by one vote to reach the two-thirds majority necessary to change the place where the Court shall sit, for at least the opening of trial in this case, to either the Republic of Kenya (“Kenya”) or alternately the United Republic of Tanzania (“Tanzania”).¹ The defence for Mr. William Samoei Ruto (“Defence”) respectfully applies to the Presidency of the ICC to vacate the “Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*” (“Plenary Decision”),² dated 26 August 2013. In the alternative, the Defence requests that the Presidency reconvene the Plenary of Judges to decide whether the Plenary Decision is void for procedural impropriety, and should be vacated.

2. The Defence submits that the Plenary Decision must be vacated due to gross procedural unfairness arising from the submission of the “Prosecution’s Observations on the possibility of holding parts of the trial in Kenya or alternatively in Arusha, Tanzania” (“Additional Submissions”).³ The Prosecution filed the Additional Submissions on the eve of the Plenary of Judges convening to consider the Joint Defence Application.⁴ Instead of rejecting the late submission by the Prosecution, or alternatively adjourning the Plenary session in order to allow the defence and other interested parties (in particular Kenya and Tanzania) to respond to and/or make observations on the Additional Submissions, the Plenary of Judges accepted the Prosecutor’s filing. It is clear that these additional submissions of the Prosecution were either decisive or weighed heavily on the deliberations and decision of the Plenary of Judges.

¹ ICC-01/09-01/11-875-Anx, para. 5.

² ICC-01/09-01/11-875-Anx.

³ 10 July 2013, ICC-01/09-01/11-809-Conf.

⁴ Joint Defence Application for a Change of Place where the Court Shall Sit for Trial, 24 January 2013, ICC-01/09-01/11-567.

3. The Separate Opinion of His Honour Judge Eboe-Osuji to the Plenary Decision (“Separate Opinion”) clearly details the effect and impact the Additional Submissions had on the decision rendered by the Plenary of Judges. The Learned Judge states:⁵

45. It was obvious that the Prosecution's late change of position had weighed on the mind of the judges who voted against the proposal. This is evident in the repeated concerns expressed to the effect that with the Prosecution changing their position, it then appeared that it was only the judges who were in favour of commencing the trial in Nairobi, or words to that effect.

46. ...[I]t is important to note the change of position and how it was communicated to the Plenary. It is to be noted that in their initial submissions filed on 21 February 2013, the Prosecution's ultimate position was expressed as follows:

[O]ne suggestion may be to hold portions of the trial in Kenya or Arusha, Tanzania, such as the opening/closing statements, the unsworn oral statement pursuant to Article 67(1)(h), the testimonies of the two Accused (should they choose to proceed therewith), and/or the testimonies of international experts. Hearings of this nature could strike the right balance between bringing the trial as close as possible to the affected region and thus satisfy the public interest in the case, and the need to protect witnesses.

47. This submission remained on the record of this Court until the close of business on 10 July 2013—being the eve of the Plenary. That is to say, the Defence whose motion was under consideration by the Plenary, following the recommendation of Trial Chamber V(a), was entitled to rely on that position that the Prosecution had left so clearly on the record up until the close of business on the day before the Plenary that was scheduled to commence at 10am 1 [sic] July 2013. But, by the morning of the Plenary the judges' bundles of documents for the Plenary had been updated with a new filing by the Prosecution. In the new filing, the Prosecution now changed their position, registering unequivocal opposition to conducting any part of the hearing in Kenya. As they put it:

⁵ Paragraphs 45 to 48 (emphasis added) (internal citations omitted).

Given the present context in Kenya ... the Prosecution is now of the view it may not be in the interest of justice that any part of the trial be held in Kenya.

48. This new Prosecution filing, as it were, was received by the Registry at 6.28pm on 10 July 2013. The procedural flaws in this are as follows. First, in the best case scenario, a filing done so late would have left the Defence practically without an opportunity to react to the new filing before the Plenary scheduled to commence at 10am the next morning. Second, the deprivation of this opportunity to the Defence is even more acute. This is because the Registry's dissemination of the filing through the usual Court Management-Court Records email communication system occurred only at 1.25pm on 11 July 2013. That is more than three hours after the commencement of the Plenary. That is to say, it is possible that this was the first opportunity that the Defence would have had to learn that the Prosecution had filed new submissions objecting to the conduct of any part of the hearings in Kenya. And, finally, one of the annexes containing the crux of the reasons for the Prosecutor's change of position was filed ex parte—meaning it was provided only to the Chamber, and was not to be provided to the Defence nor to any other person or entity that may have been cast in a bad light—as was indeed the case—in the discussion conducted in the annex. It is truly difficult to avoid a view of what had occurred as an instance of ambush in legal proceedings, regardless of any question of an intention to do so. It is a method with no legitimate place in any proceedings of an international criminal court of this calibre. In the circumstances, the late filing should not have been received into the proceedings of the Plenary.

4. His Honour Judge Eboe-Osuji further observed that “the Prosecutor’s very late change of positions...did not occur until the period following the Open Letter”⁶ that was “authored by an individual [Gladwell Otieno] who had also appeared as a petitioner before the Supreme Court of Kenya in a case seeking to nullify the election of the accused [Mr. Ruto] in the political office that he now occupies in Kenya”.⁷

⁶ Separate Opinion, para 49.

⁷ Separate Opinion, para 50.

5. In all the circumstances, and as outlined in the Separate Opinion, the Defence submits that the Plenary Decision was issued in violation of basic principles of natural justice including *audi alteram partem*. The Prosecution's last minute *volte face* as detailed in the Additional Submissions, including the *ex parte* annex thereto, was notified to the Defence almost three hours *after* the convening of the Plenary of Judges. Accordingly, the Defence (pursuant to Regulation 24(1) of the Regulations of the Court), as well as Kenya and Tanzania, had no opportunity, let alone a reasonable one, to respond to these submissions prior to the decision of the Plenary of Judges. Indeed, it was not expected that the Plenary of Judges would consider the submissions of the Prosecutor, let alone allow it to have impacted their decision. As indicated above, His Honour Judge Eboe-Osuji noted that "[i]t was obvious that the Prosecution's late change of position had weighed on the mind of the judges who voted against the proposal".⁸

6. Compounding this procedural impropriety, the substance of the Prosecution's Additional Submissions are matters in dispute – and expressly not accepted by the Defence. The Defence expresses significant concern that it was not given the opportunity to respond to the Prosecutor's Additional Submissions and that it was not provided even a summary of the *ex parte* annex which "cast in a bad light" certain "person[s] or entit[es]".⁹ In addition, the appearance of fairness was undermined by the fact that the Prosecution's change of position was filed one day after¹⁰ the delivery of the Open Letter to the President of the Court from a known opponent of Mr. Ruto who opposed Trial Chamber V(A)'s decision to excuse Mr. Ruto from continuous presence at trial.¹¹ The same individual was also opposed to "the recommendation of the Trial Chamber viewing as desirable the commencement of the trial in Kenya".¹² As noted by His Honour Judge Eboe-

⁸ Separate Opinion, para. 45.

⁹ Separate Opinion, para. 48.

¹⁰ See Separate Opinion, para. 33 (indicating that the Open Letter to the President of the ICC was received two days prior to the scheduled convening of the Plenary of Judges).

¹¹ Separate Opinion, para. 49.

¹² *Ibid.*

Osuji, the author of the Open Letter “clearly considered [both dispositions] as inuring to the advantage of Mr Ruto”.¹³

7. It is particularly concerning to the Defence that the self-serving, highly contested opinions of political opponents of an accused can be received so readily by the Court without affording such accused any right to respond. As His Honour Judge Eboe-Osuji rightly observed:

*Especially as regards the opposition of the author of the Open Letter to the decision on the excusal from continuous presence, are the Defence, in line with their earlier complaints, not entitled to complain that the author of the Open Letter, having failed to defeat the accused's political ambitions in the political or legal arenas of Kenya, might now be seeking to use the processes of this Court to achieve what could not be achieved in Kenya—i.e. precisely the frustration of the accused in his ability to discharge the functions of the office to which he has been elected against the obvious wishes of the author of the Open Letter? The processes of this Court must not be allowed exposure to such questions.*¹⁴

8. The Defence submits that the manner in which the Plenary of Judges took the Plenary Decision runs counter to well-established principles of fairness.¹⁵ The fact

¹³ Separate Opinion, para. 49.

¹⁴ Separate Opinion, para. 50.

¹⁵ Procedural impropriety may vitiate the legality of judicial decisions. See, for example, *Prosecutor v. Blaskic*, IT-95-14, ICTY Appeals Chamber, Decision on prosecution motion to set aside the decision of the Appeals Chamber of 29 July 1997 (1997) (recognizing the principle “*audiat et altera pars*” and holding that the principle was not violated in the particular circumstances of the case and in view of the relevant provisions of the ICTY Rules of Procedure and Evidence when the Appeals Chamber considered a request from the Republic of Croatia to be admissible without first hearing from the parties, but noting that “*the Parties, as well as Croatia and any amici curiae, remain free to make submissions on the issue of admissibility at the hearing*” that had been scheduled) (emphasis in original); *Brandstetter v. Austria*, ECtHR, Judgment, Application no. 11170/84 / 12876/87 / 13468/87 (1991), paras. 67-69 (“*The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party....[W]hatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon....An indirect and purely hypothetical possibility for an accused to comment on prosecution arguments included in the text of a judgment can scarcely be regarded as a proper substitute for the right to examine and reply directly to submissions made by the prosecution....The Court therefore concludes that, in the appeal proceedings...there was a violation of Article 6 para. 1 (art. 6-1) of the Convention.*”) (emphasis added); *Windsor v. McVeigh*, 93 U.S. 274 (1876), at 267 (“*A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.*”); *Hadmor Productions Ltd. v. Hamilton* (House of Lords) [1983] 1 A.C. 191, at 232-233 (setting aside an order of the Court of Appeal and holding that: “*Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit*

that the Prosecutor is institutionally one of the three organs of the Court, should not cloak her with any extra privileges. In particular, the principle that the Prosecution and the defence are procedurally equal before the Court goes to the heart of the fair trial rights of an accused – as well as the standing and confidence that all parties will have in the ICC itself. No attempt to whittle down this principle of procedural equality between the parties can be entertained and in seeking to uphold this cardinal principle, the Defence files this application.

Relief Requested

9. For the reasons set out above, the Defence respectfully requests that the Presidency vacate the Plenary Decision and reconvene the Plenary of Judges after having received the submissions of the defence, and if deemed necessary the Republics of Kenya and Tanzania, on the Prosecution's Additional Submissions.

10. In the alternative, should the Presidency determine that it does not have the authority to vacate a decision of the Plenary of Judges, the Defence submits the Presidency should reconvene the Plenary of Judges so that the Plenary can determine whether the Plenary Decision should be vacated for procedural impropriety and/or unfairness.

Respectfully submitted,



Karim A.A. Khan QC
Lead Counsel for Mr. William Samoei Ruto

Dated this 1st Day of September 2013
At The Hague, the Netherlands

of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is.”).