

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-01/11
Date: 20 September 2013

APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kouroula
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 “Joint *Amicus curiae* Observations of the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda on the Prosecution's appeal against the ‘Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial’” (ICC-01/09-01/11-948)

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Others

Republic of Rwanda

United Republic of Tanzania

Republic of Burundi

State of Eritrea

Republic of Uganda

Introduction

1. The Prosecution hereby responds to the 17 September 2013 “Joint *Amicus curiae* Observations of the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda on the Prosecution's appeal against the ‘Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial’” (“Observations”).¹ The arguments in the Observations add little to those previously made by the Defence. They appear to rely on a misinterpretation of the law. Moreover, they are supported by policy considerations extraneous to the narrow legal issue on appeal. On this last point, the Prosecution is mindful of the sensitivities that the issue on appeal touches upon. This however cannot impact on the Prosecution’s duty to contribute to the proper interpretation of the relevant provisions of the Rome Statute by the Appeals Chamber, going to fundamental questions related to the Trial Chamber’s authority and the validity of the trial. The Prosecution therefore requests that the Observations be dismissed.

Procedural history

2. On 29 July 2013, the Prosecution filed its document in support of an appeal (“Appeal”)² against the Trial Chamber V(a)’s 18 June 2013 “Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial” (“Decision”),³ to which the Defence responded on 8 August 2013 (“Response”).⁴
3. On 10 September 2013, the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda (“Applicants”)

¹ ICC-01/09-01/11-948.

² ICC-01/09-01/11-831.

³ ICC-01/09-01/11-777.

⁴ ICC-01/09-01/11-846.

requested leave to submit *amicus curiae* observations,⁵ which the Appeals Chamber granted on 13 September 2013,⁶ Judge Ušacka dissenting (“Dissent”).⁷

Submissions

I. The arguments are unfounded in law.

4. First, the Applicants’ submission that “Article 63 should be interpreted in a broad and flexible manner”⁸ has no basis in the Rome Statute or the jurisprudence of the Court. Instead, the Appeals Chamber has found that “[t]he interpretation of [...] the Rome Statute [...] is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of articles 31 and 32”, and that “[t]he rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose”.⁹ As the Prosecution submitted in its Appeal, the ordinary meaning of Article 63(1), when read in context and in light of its object and purpose, could not be clearer. It is brief and unambiguous, and reflects a clear choice by the drafters and accepted by State Parties to the Statute: the accused’s presence at trial is required.
5. The Applicants also cite to paragraph 11 of the Preamble in support of their legal submissions, stating that the Trial Chamber’s interpretation of Article 63 in the Decision “respects and upholds [...] the interests of international justice”¹⁰ because “lasting respect for and the enforcement of international justice are undoubtedly better guaranteed where a high officer of a State [...] does not have to consider the unnecessary and false choice [between] [...] respect for and obligation to comply with international law, and [...] national constitutional

⁵ ICC-01/09-01/11-918-Anx1; ICC-01/09-01/11-921-Anx1; ICC-01/09-01/11-924-Anx1; ICC-01/09-01/11-926-Anx1; ICC-01/09-01/11-928-Anx1.

⁶ ICC-01/09-01/11-942.

⁷ ICC-01/09-01/11-942-Anx.

⁸ ICC-01/09-01/11-948, para. 2.

⁹ ICC-01/04-168 OA 3, para. 33 (citations omitted).

¹⁰ ICC-01/09-01/11-948, para. 4.

obligations”.¹¹ Paragraph 11 of the preamble, however, does not support the Applicants’ position.¹² As a lead commentator notes, this paragraph “serves as a reminder to States Parties of the object and purpose of the Statute and their obligation to co-operate fully with the Court in its investigation and prosecution of crimes within its jurisdiction and to comply with its requests”.¹³ It certainly does not create an exception to the application of the law for elected officials; to the contrary, paragraph 11 of the Preamble reminds that the Court’s legal framework and its orders need to be abided.

6. Second, the Applicants submit primarily policy concerns in support of the Observations, arguing that the Decision “encourage[s] greater cooperation [...] from States Parties”¹⁴ and is “viewed positively by non-States Parties”.¹⁵ These policy concerns, however worthwhile they may be on their own, are extraneous to the Appeals Chamber’s determination because the issue on appeal is a narrow and purely legal question of the appropriate interpretation of Article 63,¹⁶ which must be resolved on legal, rather than policy grounds. As the Prosecution argued in the Appeal, Article 63 is “exhaustively dealt with”¹⁷ in the Statute’s text, which precludes the Appeals Chamber from referring to other sources of law or to policy dictates to assist in its analysis. The Court is an independent legal institution and does not render its decisions with the purpose of encouraging the ratification of the Rome Statute by non-State parties or to facilitate greater cooperation of State Parties by altering the true meaning of its basic legal texts.

¹¹ ICC-01/09-01/11-948, paras 3- 4. See also para. 10

¹² “Resolved to guarantee lasting respect for and the enforcement of international justice”.

¹³ Morten Bergasmo in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed., C. H. Beck-Hart-Nomos, 2008), p. 14.

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¹⁵ ICC-01/09-01/11-948, para. 4.

¹⁶ Judge Ušacka confirmed in her Dissent that, “[t]he present appeal raises questions of an entirely legal nature related to the scope and function of article 63 of the Statute”, ICC-01/09-01/11-942-Anx, para. 4.

¹⁷ ICC-01/09-01/11-831, para. 32, citing to ICC-01/04-01/06-772 OA 4, para. 34.

7. Third, the Applicants submit that the fact of an accused person holding a “high governmental office” constitutes “exceptional circumstances”¹⁸ that would permit altering the terms of Article 63. As argued in the Appeal, excusing an accused from attending substantially all of his trial to accommodate the demanding functions of a Deputy Head of State contradicts the principle of equal treatment under the Rome Statute as expressed in Article 27(1) and Article 23(1).¹⁹

II. The arguments in the Observations already have been canvassed adequately by the parties.

8. The Prosecution further notes that, as Judge Ušacka forewarned in her Dissent, the arguments in the Observations “have already been adequately canvassed by the parties to the present proceedings”.²⁰ Both the Appeal²¹ and Response²² address in detail the interpretation of Article 63(1). In particular, the Response specifically promotes a “holistic approach”²³ that aligns closely with the Observations’ “broad and flexible” approach.²⁴ The policy reasons used in support of the Observations are similarly covered in the Response.²⁵ Thus, the Observations do not actually raise novel arguments or issues that were not already before the Appeals Chamber.

III. Additional Observations.

9. The Prosecution notes that although Burundi is represented as “*Amicus Curiae*” in the Observations, and its Minister of External Relations and International Cooperation is referred to as signatory (although only the Rwandan

¹⁸ See, e.g., ICC-01/09-01/11-777, para. 49.

¹⁹ See ICC-01/09-01/11-831, paras 35-36.

²⁰ ICC-01/09-01/11-942-Anx, para. 6.

²¹ ICC-01/09-01/11-831, paras 10-33.

²² ICC-01/09-01/11-846, paras 5-28.

²³ ICC-01/09-01/11-846, para. 6.

²⁴ ICC-01/09-01/11-948, para. 2.

²⁵ ICC-01/09-01/11-846, paras 36-37.

representative has signed the Observations),²⁶ on 18 September 2013 the Registry transmitted a letter from Burundi informing the Chamber that Burundi needed additional time to provide the observations.²⁷ The wording of this letter appears to indicate that Burundi was unaware that the Observations had been filed one day earlier, on 17 September 2013, also on its behalf. This brings into question whether Burundi, a State Party, joins in these Observations.

Conclusion

10. For the above reasons, the Prosecution requests the Appeals Chamber to dismiss the Observations.



Fatou Bensouda, Prosecutor

Dated this 20th day of September 2013
At The Hague, The Netherlands

²⁶ See ICC-01/09-01/11-948, “source” on the title page, “Amicus Curiae” on the notifications page, p. 8.

²⁷ ICC-01/09-01/11-950-Anx1.