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

Date: 23 September 2013

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
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

Defence response to the requests from the Federal Democratic Republic of Ethiopia and the Federal Republic of Nigeria for leave to submit *amici curiae* observations

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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Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber V(A)
Federal Democratic Republic of Ethiopia
Federal Republic of Nigeria

I. Introduction

1. The Appeals Chamber is currently seized of the *Prosecution's appeal against the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial"* ("Appeal").¹
2. The defence for Mr. William Samoei Ruto ("Defence"), similar to its previous submission² with respect to the requests of five states,³ does not oppose the requests for leave to submit *amici curiae* observations in the Appeal filed by the Federal Democratic Republic of Ethiopia⁴ and the Federal Republic of Nigeria⁵, (together the "Requests"). The Defence respectfully submits that the novelty of the issues on appeal and their direct relevance to issues of State cooperation mean that the proposed observations of these two States, which include a non-State Party, will be of assistance in the determination of the Appeal.

II. Submissions

3. Central to the determination of the Appeal is the interpretation of Article 63(1) of the Rome Statute ("Statute"). The arguments advanced by both the Prosecution and the Defence in support of their interpretations of this article, *inter alia*, engage the interests of States.
4. The Prosecution advocates for, in the Defence's submission, an overly narrow interpretation of Article 63(1).⁶ In advocating for such an interpretation, the Prosecution raises the concern that because "the Prosecution focuses its investigations on persons who bear the greatest responsibility for the most serious crimes under the Statute" it is "foreseeable that future accused will hold

¹ ICC-01/09-01/11-831.

² Defence response to the requests for leave to submit amici curiae observations, 12 September, ICC-01/09-01/11-932.

³ These being the requests of: the United Republic of Tanzania (ICC-01/09-01/11-922-Anx1); the Republic of Rwanda (ICC-01/09-01/11-921-Anx1); the Republic of Burundi (ICC-01/09-01/11-924-Anx1); the State of Eritrea (ICC-01/09-01/11-926-Anx1); the Republic of Uganda (ICC-01/09-01/11-928-Anx1).

⁴ ICC-01/09-01/11-951-Anxl.

⁵ ICC-01/09-01/11-952-Anxl.

⁶ ICC-01/09-01/11-846, para. 2.

functions that may make the Majority's test applicable to them."⁷ In response, the Defence argued that its broader interpretation of Article 63(1) – on a case by case basis and where appropriate – “has the potential to bolster the effectiveness of the Court by demonstrating that the Court's framework can accommodate a flexible and pragmatic approach to surrendering to its jurisdiction and to participating in proceedings by those occupying high office.”⁸ In addition, the Defence submitted that such an approach “would serve to encourage cooperation by serving leaders, and, thus, enhance the Court's ability to pursue its important aims”.⁹

5. The Requests present the Court with the opportunity to engage with States, including States which are not States Parties to the Statute, in respect of the proper interpretation of Article 63(1). Such engagement is particularly apposite in light of the groundwork laid in both parties' submissions in the Appeal. Accordingly, the Defence submits that the Appeals Chamber should exercise its discretion to grant the Requests because the proposed observations are “desirable for the proper determination” of the Appeal.¹⁰

III. Relief Requested

6. For the reasons stated above, the Defence submits that the Appeals Chamber should grant the Requests.

⁷ Appeal, para. 38.

⁸ ICC-01/09-01/11-846, para. 37.

⁹ *Ibid* and footnote 71 which noted that “[a]ccording to the Statute's Preamble, the aims of the Court are, inter alia, “to put an end to impunity” and to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished.”

¹⁰ Rules of Procedure and Evidence, Rule 103(1).

Respectfully submitted,



Karim A.A. Khan QC

Lead Counsel for Mr. William Samoei Ruto

Dated this 23rd Day of September 2013

At The Hague, The Netherlands