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Date: 20 November 2013

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccion
Judge Robert Fremr

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 Prosecution's Request for provision of further
information and Reconsideration of the excusal of William Ruto**

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

I. INTRODUCTION

1. The defence for Mr. William Samoei Ruto (“Defence”) respectfully submits that the *Prosecution’s Request for provision of further information and Reconsideration of the excusal of William Ruto*¹ (“Request”) should be dismissed as precipitous, unnecessary and fundamentally lacking in legal foundation.
2. There are no “new facts or circumstances” meriting reconsideration of the Excusal Decision,² no basis on which the Kenyan delegation must disclose in advance details of its address to the Assembly of States Parties (“ASP”) and no proper basis on which this Chamber should be seized of the Request given the facts before it and the representations made by Defence counsel regarding awareness of and intended compliance with court orders.

II. SUBMISSIONS

Preliminary observation

3. Courtesy is a basic hallmark of the Bar and is extended to all parties, including an accused, who is entitled to the presumption of innocence.³ It is, therefore, regrettable that basic courtesies appear to have been deliberately jettisoned in the Request with Mr. Ruto and Mr. Kenyatta being peremptorily referred to as “Ruto” and “Kenyatta” respectively.⁴ Given that the Request is just 6 pages long, this abbreviation was not necessitated by issues of page or word limits. The Defence accepts that on occasion parties can inadvertently abbreviate names in the course of oral submissions⁵ but such action is clearly different when made in a considered, formal, written filing. The Trial Chamber has previously acknowledged that basic courtesies including the use of common titles should be

¹ ICC-01/09-01/11-1104.

² ICC-01/09-01/11-T-69-CONF-ENG, p. 55, lines 24-25 (“Excusal Decision”).

³ Rome Statute, Article 66.

⁴ The Prosecution has previously referred to “Mr. Ruto” and “President Uhuru Kenyatta” in filings. See, e.g., ICC-01/09-01/11-990-Conf, ICC-01/09-01/11-974 and ICC-01/09-01/11-1102-Conf-Red.

⁵ See, e.g., Defence counsel’s omission, ICC-01/09-01/11-T-53-CONF-ENG, p. 20, line 22 to p. 21, line 16.

observed in these proceedings.⁶ The Request does not warrant a departure from this direction.

The Request is without legal and factual merit

4. Mr. Ruto and Defence counsel are fully cognizant of the terms of the Trial Chamber's decision granting Mr. Ruto's excusal from trial proceedings on 21 November 2013⁷ and the Trial Chamber's orders regarding commenting on the merits of the case to the media.⁸ Through Defence counsel, Mr. Ruto has expressly acknowledged that he "is fully aware of his responsibilities and obligations to the Court" and has stated that he "will of course comply with all applicable court orders."⁹ Such representations by members of the Bar should be sufficient. But, notwithstanding the Defence's response, the Prosecution has considered it necessary to file its present application. The Request is characterised by speculation and misconceived assumptions. The Defence submit that the Prosecution have wasted court time and Defence resources by filing an application which is frivolous.

5. Trial Chambers should only be seized of matters which are ripe for determination and supported by sound legal and factual assertions. Reconsideration of a decision may be appropriate where, *inter alia*, the applying party shows "*new facts or circumstances that may influence that decision*".¹⁰ In the Request the Prosecution patently fails to satisfy this legal standard.

⁶ ICC-01/09-01/11-T-50-CONF-ENG, p. 72, lines 20-22 ("In the courtroom we should follow the formalities for everyone, not just for Mr Ruto but for everybody, including witnesses and counsel. So, yes, the title should be used, the common ones.") The Defence also notes the Code of Conduct for the Office of the Prosecutor, Article 26 which provides that "Honourable conduct encompasses the embodiment of the dignity of the Office, which includes, *inter alia*: [...] (c) dignified and courteous conduct towards the persons under investigation or the accused; [...] (e) dignified and courteous conduct towards counsel and their team members.

⁷ ICC-01/09-01/11-T-69-CONF-ENG, p. 55, lines 24-25.

⁸ ICC-01/09-01/11-T-51-CONF-ENG, p. 12, line 15 to p. 13, line 4; ICC-01/09-01/11-T-59-CONF-ENG, p. 25, lines 6-24.

⁹ See email from Defence counsel to the Prosecution attached as Confidential Annex C to the Request.

¹⁰ *Prosecutor v. Bemba*, Trial Chamber III, Public Redacted Version of the Decision on the "Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo" of 2 September 2011, 6 September 2011, ICC-01/05-01/08-1691-Red, para. 17.

6. The sole basis for the Prosecution's claim that the reasons for Mr. Ruto's excusal from attendance at trial have fallen away appears to be Mr. Ruto's simple designation as leader of the Kenyan delegation to the ASP, which commences on 20 November 2013.¹¹ The ASP will take place over 8 days, from 20 to 28 November 2013. This period includes a weekend. The Defence never intimated to the Prosecution any information regarding Mr. Ruto's attendance at any part of the 8 day ASP. Nor did it have to. Instead, the Defence simply confirmed that Mr. Ruto "will...be leading the Kenyan Delegation to the forthcoming ASP."¹² Mr. Ruto's designation as "Leader of Delegation"¹³ is unsurprising given that Mr. Ruto will be the senior Kenyan statesman present in the Hague during the course of the ASP.

7. The Defence's confirmation that Mr. Ruto is the "Leader of Delegation" of the Republic of Kenya does not warrant – or in any way justify or necessitate – the Prosecution's application. The Request is, the Defence submits, unnecessary and devoid of any legal merit. In any event, the Office charged with the prosecution of the most serious crimes by the Rome Statute should, the Defence submits, be reluctant to so readily file applications, take up court time and engage wasted costs based upon erroneous speculation and baseless guesswork.

8. This is particularly so when, in addition to offering reassurances about awareness of responsibilities and intent to comply with all court orders, the Defence properly advised the Prosecution that it "will keep the Trial Chamber and [the Prosecution] updated in the event there are any changes which should be brought to the Chamber's attention."¹⁴ Neither Mr. Ruto nor Defence counsel are under any obligation to provide further information, particularly regarding

¹¹ See, e.g., Request, para. 1.

¹² See email from Defence counsel to the Prosecution attached as Confidential Annex C to the Request.

¹³ See Confidential Annex A.

¹⁴ See email from Defence counsel to the Prosecution attached as Confidential Annex C to the Request.

the diaries and movements of Heads and Deputy Heads of State that do not impinge upon any Court order.¹⁵

9. Rather than being satisfied with the Defence's response and the representations of counsel, the Prosecution chose to take the precipitous move of filing the Request with the court. This is a matter of considerable regret. Particularly when it is predicated on an unjustified and unfair assumption that neither Mr. Ruto nor Defence counsel will seek to adhere to court orders. It is a filing that assumes bad faith. The Defence submits that it has every right to take strong exception to this and to being compelled to unnecessarily expend its resources on a response to such an ill founded application by the Office of the Prosecutor.

10. Notwithstanding the foregoing, the Defence confirms that there has been no change of circumstances from the position advanced by the Defence on 8 November 2013. The President of the Republic of Kenya, H.E. Uhuru Kenyatta, remains, at the time of filing this Response, in the Kingdom of Kuwait attending the AU-Arab summit – precisely as indicated to the Trial Chamber on 8 November 2013. Mr. Ruto remains in Kenya and will not travel to the Hague until 21 November 2013 when the President returns to Nairobi. As indicated, Mr. Ruto will be attending court on 22 November 2013. The Defence deplores the fact that it has to needlessly repeat the information it previously provided to the court in this response. The Defence further informs the Court that if such filings are repeated by the Prosecution it reserves the right to make an application for wasted costs against the Prosecution.¹⁶

¹⁵ The Prosecution's submissions that the Defence was "vague and evasive" is, therefore, without merit. See Request, para. 10.

¹⁶ There is no express provision in the Court's legal instruments which deals with wasted costs. However, both Trial Chamber V and Trial Chamber IV have recognized the inherent powers retained by the Chambers of the Court that are necessary for the fulfilment of the Court's essential purposes including the proper, efficient and fair management of proceedings. See *Prosecutor v. Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, para. 74 (recognizing the Court's inherent powers with respect to stays of proceedings "where violations of the rights of the accused make it impossible for a fair trial to take place"); *Prosecutor v. Banda*, Decision on a defence request for a temporary stay of proceedings, ICC-02/05-03/09-410, para. 77 (holding that a tribunal retains "inherent jurisdiction",

11. The Prosecution's request regarding Mr. Ruto's proposed address to the ASP is also without merit. The Trial Chamber's orders regarding commenting on the case are clear. The Prosecution's request for clarity is disingenuous and amounts to no more than a fishing expedition about the intentions of a delegation to the ASP.

III. RELIEF REQUESTED

12. For the reasons set out above, the Defence respectfully requests that the Trial Chamber dismiss the Request as precipitous, unnecessary and without foundation.

Respectfully submitted,



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

Dated this 20th Day of November 2013
At The Hague, Netherlands

[which] is well-grounded in international law, [and] which generally recognises that an international body or organisation 'must be deemed to have those powers which, though not expressly provided in the [constitutive instrument], are conferred upon it by necessary implication as being essential to the performance of its duties'').