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

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

**Sang Defence Response to the Prosecution's Request for provision of further
information and Reconsideration of the excusal of William Ruto,
19 November 2013.**

Source: Defence for Mr. Joshua arap Sang

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

The Office of the Prosecutor

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James Stewart, Deputy Prosecutor
Anton Steynberg, Senior Trial Attorney

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Legal Representatives of the Victims

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
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**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. On 19 November 2013, the Prosecution filed an urgent request for reconsideration of the previous excusal of Mr. William Samoei Ruto ("Ruto") from trial on 21 November 2013.¹ While that application is not directed at Mr. Joshua arap Sang, the Sang Defence opposes the Prosecution's request to the extent that it invites or suggests Trial Chamber V(A) ("Chamber") should define or limit the Republic of Kenya's ("Kenya") representation at the Assembly of States Parties ("ASP") Twelfth Session or unduly influence the content of discussions.

II. SUBMISSIONS

2. It is submitted that it would not be fair or appropriate for Kenya to be told and or advised on (i) who should represent it at the state parties meeting, nor (ii) as to what should not be discussed at the ASP at the request of the Prosecution.
3. Mr. Sang is a Kenyan Citizen and would like to be represented at the ASP by persons who the Kenyan Government have deemed appropriate to represent it. The Sang Defence submits that the Prosecution's urgent request essentially seeks to deny States Parties the right to be represented by an Accused person. For example, the Prosecution submitted in its application "The Prosecution notes the apparent conflict of interest between Ruto's public position as leader of the Kenyan delegation and his personal position as an Accused."² The Sang Defence submits that it is the prerogative of a sovereign state to choose who represents it in a diplomatic setting. Any considerations as to Ruto's excusal so that he may attend the ASP should not be based on the Prosecution's views as to the appropriateness of a sovereign state's choice of representation, but instead solely on the content of the Court's rules and associated jurisprudence.
4. In the context of impending discussions at the ASP around proposed changes to the Rome Statute,³ it is further submitted that there is a risk that limiting a Party's freedom to choose who should represent it may be perceived as an attempt to influence the outcome of discussions.
5. In terms of limiting what can be discussed at the ASP, while recognising there are orders in place for this trial concerning public statements, the Sang Defence submits that the Chamber should be careful in influencing the content of discussions between States Parties. Both the Prosecution and the Chamber itself have been established by the Rome Statute agreed upon by the States Parties, and it would be awkward to have orders issued by the Chamber which are directed at a Party and implicate how an individual Party (and indirectly the wider membership) should conduct and participate in proceedings. If any orders are

¹ ICC-01/09-01/11-1104.

² Ibid, p 7.

³ For example, the proposal to amend Rule 68.

made, the Sang Defence is confident that the Chamber will have appropriate regard for this concern.

III. CONCLUSION

6. The Sang Defence opposes the Prosecution's urgent request to the extent that it suggests the Chamber should limit or restrict representation at the ASP and content of discussions in that forum.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 20th day of November 2013
In The Hague, Netherlands