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

Joint Defence response to the “Prosecution request for leave to reply to the RUTO Defence’s 8 January 2014 and the SANG Defence’s 8 January 2014 response to the Prosecution’s request under Article 64(6)(b) and Article 93 to summon witnesses and variation of time limits under Regulation 35(2)”

Sources: Defence for Mr. William Samoei Ruto
Defence for Mr. Joshua Arap Sang

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

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Other

I. Introduction

1. Despite being granted 19 extra pages for its application expressly in order to deal with the novel and complex legal issues the Prosecution intended to address therein,¹ the Prosecution now seeks leave² to effectively make a further round of submissions on its application concerning whether this Trial Chamber has the authority to: require the attendance and testimony of witnesses; request Kenya to serve a summons on a witness; and request Kenya, if necessary, to execute and enforce that summons.³
2. The defence for Mr. William Samoei Ruto and the defence for Mr. Joshua Arap Sang (together “the Defence”) oppose the Request. In short, given the nature of the Application, all the legal arguments raised by the Defence in response should reasonably have been anticipated by the Prosecution. A reply is not a mechanism to be used by the parties to remedy deficient filings. Further, the provision by the defence for Mr. Ruto of certain Prosecution disclosures as annexes to its response⁴ means that the Trial Chamber is in possession of all the information it requires to assess the factual matters identified in the Request.⁵ The Defence respectfully submit that no additional submissions on these matters are merited.

II. Classification

3. In the Request, the Prosecution states that the filing should be classified as “confidential” until such time as “*public redacted versions of the Defence Responses are filed*”.⁶ The Prosecution refers to the public redacted version of the response submitted by the defence for Mr. Sang as the confidential version. This is, however, incorrect. The defence for Mr. Sang filed a confidential response on 8

¹ ICC-01/09-01/11-1106-Conf. See, in particular, para. 4.

² ICC-01/09-01/11-1148-Conf (“Request”).

³ ICC-01/09-01/11-1120-Conf-Red-Corr2 (“Application”).

⁴ ICC-01/09-01/11-1136-Conf-AnxA and ICC-01/09-01/11-1136-Conf-AnxB.

⁵ Request, para. 6.

⁶ Request, para. 3.

January 2014,⁷ and a public redacted version of that response on 10 January 2014.⁸ The defence for Mr. Ruto filed a public redacted version on 8 January 2014.⁹ Accordingly, this filing is classified as “public” as it does not contain any confidential information and responds to a filing in respect of which there is no existing basis for its confidential classification.

III. Submissions

4. Assessing the Request broadly, the matters identified at sub-paragraphs 5(i) to (iii) of the Request all concern arguments advanced by the Defence in respect of the interpretation of two articles of the Rome Statute (“Statute”) which are central to the Application – Articles 64 and 93. It was clearly reasonable to anticipate that the Defence would conduct detailed analyses of both these articles, particularly when the Prosecution asserts in the Application that it is the combination of Articles 64(6)(b), 93(1)(d) and 93(1)(l) of the Statute which provide the Trial Chamber with the requisite authority to request the Republic of Kenya to compel witnesses to appear and testify before the Court.¹⁰ It is equally evident that, given the terms of Article 93(1)(e) of the Statute, this sub-article would also be the subject of a considered analysis, including the assertion that it is the *lex specialis* governing the appearance of witnesses before this Court.
5. More specifically, a review of the Application shows that the Prosecution had adequate opportunity – and, as noted above, adequate space - to address each of the matters identified in sub-paragraphs 5(i) to (iii) of the Request. Of relevance in this regard are: (i) paragraphs 87 to 93 of the Application which effectively focus on Article 93(1)(e) and the argument one commentator has made that it contains “*the sum total of [a State Party’s] duty to the Court*”;¹¹ (ii) paragraph 67 of

⁷ ICC-01/09-01/11-1138-Conf.

⁸ ICC-01/09-01/11-1138-Red.

⁹ ICC-01/09-01/11-1136-Red2 (“Ruto Response”).

¹⁰ See, e.g., Application, paras. 3, 63, 66-68.

¹¹ Application, para. 88.

the Application where the relationship between Articles 64(6)(b) and 93(1)(l) is dealt with; and (iii) paragraphs 81 to 84 of the Application which consider the interpretation and scope of Article 93(1)(l).

6. In addition, the legal arguments made by both defence teams were foreseeable, as was the length of the responses. These arguments rested upon well-known academic sources, none of which is especially controversial. One of the authors cited even works for the Office of the Prosecutor.¹² Most importantly, these academic sources were discussed at length, and relied upon by the Prosecution in its original Application.¹³ For example, the submission in the Ruto Response that the tension between Articles 93(1)(e) and 64(6)(b) of the Statute can be resolved by concluding that *“article 64 para. 6(b) [may] create an international obligation of persons to appear before the Court, but that States are under no duty to enforce that obligation”*¹⁴ relies on commentaries referred to in the Application.¹⁵ Accordingly, it was to be expected that the Defence would similarly analyze the views of these academic sources in addressing the Prosecution’s submissions. The Prosecution cannot now claim that, as a matter of fairness, it should be given the opportunity to address arguments it was clearly aware of but, for whatever reason, chose not to include in the Application.¹⁶
7. Similarly, the argument made in both Defence responses that Article 93(1)(l) does not allow for *“different outcomes from different States Parties depending on the provisions of their national laws”*¹⁷ is supported by Sluiter, one of the academic sources cited extensively and challenged in the Prosecution’s original

¹² See Rastan, R., ‘Testing Co-operation: The International Criminal Court and National Authorities’ 21 *Leiden Journal of International Law* (2008), 431, cited both by the Prosecution and the Defence.

¹³ ICC-01/09-01/11-1120-Red2-Corr.

¹⁴ Ruto Response, para. 19 citing to, *inter alia*, Kress and Prost, “Article 93”, in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), pp. 1576-1577 (emphasis added) and Bitti, G., “Article 64”, in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), p. 1213.

¹⁵ Application, fn. 64 which refers, *inter alia*, to Kress and Prost, *supra*, pp. 1576-1577, 1579; Bitti, G., *supra*, p. 1213.

¹⁶ Request, para. 8.

¹⁷ Request, para. 5(iii).

Application.¹⁸ This argument was made in direct response to the Prosecution's submission that the said provision can be interpreted differently depending on the provisions of the national law of the State concerned.¹⁹ Accordingly, no "*new and distinct issues*" of law arise from the Defence responses in this regard, and it is submitted that the Chamber would not be assisted by further submissions on this particular issue.

8. Furthermore, the Sang defence submission that Rule 193 "*derogates explicitly from the Statute*" is based on a direct quote from the "Commentary on the Rome Statute" authored by Schabas,²⁰ which is equally cited by the Prosecution.²¹ This submission was predictable, because the Prosecution refers to Rule 193 as envisaging "*compelled appearance*" and defeating any argument that "*article 93(7) creates an absolute principle*".²² The Defence simply challenged this Prosecution submission. The Defence additionally observe that the Prosecution misquotes the Sang defence submission in stating that Rule 193 is alleged to be '*ultra vires*'.²³ The Sang defence response does not once refer to the term '*ultra vires*'. Accordingly, the Sang defence submission on Rule 193 does not amount to a new and distinct issue of law and in now way goes beyond the Prosecution's submissions.
9. The Defence responses are also based on the jurisprudence of the Court, as well as the *ad hoc* tribunals. This jurisprudence is well known, and a discussion thereof in the Defence responses should not have come as a surprise. This particularly holds true in relation to the submission on this same topic made by the Prosecution itself in the *Lubanga* trial.²⁴ The Prosecution requests an

¹⁸ Application, paras. 89-95.

¹⁹ Application, paras. 77-83.

²⁰ Schabas, W., *The International Criminal Court: A Commentary on the Rome Statute* (2010), Commentary on Article 93(1)(e), 1023.

²¹ Application, para. 88, fn 66.

²² Application, para. 94.

²³ Request, para. 5(iv).

²⁴ Request, para. 5(v).

opportunity to respond to the Sang defence observation that the Prosecution did not challenge the view expressed by the Presiding Judge in *Lubanga* that “[t]he Chamber has no power to compel the attendance of witnesses”, or make an application for a summons on that occasion.²⁵ This is a mere observation, not a submission, and does not warrant further submissions. At no time did the Sang defence make the argument that the Prosecution should not be able to make such an application in the present case.

10. Similarly, submissions relating to the criteria to be applied in determining if a summons should be issued²⁶ were also reasonably foreseeable matters. They do not go beyond the Prosecution’s submissions and do not include any legal novelties. The proposed criteria are based on those applied by the *ad hoc* tribunals in determining whether a request for summons should be granted. Accordingly, these criteria are not new and the Prosecution could have made submissions on them in their initial Application.
11. The Defence also respectfully submit that the issue of whether or not the Government of Kenya should be invited to provide submissions is straightforward and does not require extensive submissions.²⁷
12. Finally, in respect of the Prosecution’s request that it be given leave to reply in order to address certain factual matters,²⁸ the Defence submit that the provision of the Prosecution material on which the Ruto defence found their submissions provides the Trial Chamber with not only sufficient information to determine the issues but a proper and fair safeguard to ensure that no assertion is taken out of context.²⁹ Moreover, a dispute as to a fact does not amount to a misrepresentation. The Chamber’s role is to weigh the evidence relied upon by

²⁵ Request, para. 5(v).

²⁶ Request, para. 5(vi).

²⁷ Request, paras. 5(viii) and 9.

²⁸ Request, para. 6.

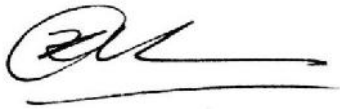
²⁹ ICC-01/09-01/11-1136-Conf-AnxA and ICC-01/09-01/11-1136-Conf-AnxB.

each party in their factual submissions concerning the witnesses and make a determination. Accordingly, it is submitted that no further submissions are warranted.

IV. Relief requested

13. For the reasons set out above, the Defence respectfully pray that the Trial Chamber dismiss the Request.

Respectfully submitted,



Mr. Karim A. A. Khan QC
Lead Counsel for William Samoei Ruto
Dated this 17th Day of January 2014
At The Hague, Netherlands



Mr. Joseph Kipchumba Kigen-Katwa
Lead Counsel for Joshua Arap Sang
Dated this 17th Day of January 2014
At The Hague, Netherlands