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

Date: 25 June 2014

**THE APPEALS CHAMBER**

**Before:** Judge Akua Kuenyehia, Presiding Judge  
Judge Sang-Hyun Song  
Judge Sanji Mmasenono Monageng  
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 application for leave to address specific issues raised in the “Prosecution consolidated response to Mr. Ruto and Mr. Sang’s appeals against the ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’”**

**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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Mr. James Stewart  
Ms. Helen Brady

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**Unrepresented Victims**

**Unrepresented Applicants  
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**REGISTRY**

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**Registrar**

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**Counsel Support Section**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. Pursuant to Regulation 28(2) of the Regulations of the Court (“Regulations”), the defence for Mr. William Samoei Ruto (“Defence”) respectfully requests that it be given leave to address the following two specific arguments advanced in the *Prosecution consolidated response to Mr. Ruto and Mr. Sang’s appeals against the “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”* (“Response”):<sup>1</sup>

(i) the erroneous assertion that in the Decision<sup>2</sup> the Trial Chamber “*makes no finding that the Court itself may compel the personal appearance of witnesses*” but “*referred only to a power to require witness appearance, which is given effect through State cooperation and domestic law*”;<sup>3</sup> and

(ii) the erroneous reliance on Article 93(1)(b) of the Rome Statute (“Statute”) as “*an alternative basis to Articles 93(1)(d) and (l) on which the Court may issue enforceable summonses*”.<sup>4</sup>

2. If the Chamber grants leave, the Defence requests that the time limit for filing additional submissions be set for a date after 30 June 2014, which is the deadline for filing any responses to the Government of Kenya’s *amicus curiae* observations.<sup>5</sup>

## II. APPLICABLE LAW

3. According to the Court’s established jurisprudence, “*for appeals under rules 154 and 155 of the Rules of Procedure and Evidence, the appellant may not seek leave to reply to a response to the document in support of the appeal. However, the Appeals Chamber may ask for further submissions on its own motion, acting under regulation 28 of the*

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<sup>1</sup> ICC-01/09-01/11-1380.

<sup>2</sup> Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2 (hereinafter referred to as the “Decision”).

<sup>3</sup> Response, para. 19. See also Response, paras. 18, 23.

<sup>4</sup> Response, p. 20. See also Response, paras. 14, 44-48, 75.

<sup>5</sup> ICC-01/09-01/11-1350, p. 3.

*Regulations of the Court.”*<sup>6</sup>

4. The Appeals Chamber’s power to request further submissions under Regulation 28 is discretionary and may be exercised, *inter alia*, where the Appeals Chamber “would be materially assisted by...further submissions”<sup>7</sup> or “the arguments...raised in a response to a document in support of the appeal make further submissions by the appellant necessary for the proper disposal of the appeal”.<sup>8</sup>

### III. SUBMISSIONS

5. In the Response, the Prosecution not only seeks to distance itself from a large part of the Decision’s reasoning<sup>9</sup> but also misstates the Trial Chamber’s findings and relies on a statutory provision which finds no basis in the Decision. These arguments are new and distinct and could not reasonably have been anticipated by the Defence. Given the import and potential effect of the issues on appeal, the Defence submits that further submissions are necessary for the proper disposal of the appeal and that the Chamber would benefit from same.
6. Contrary to the Prosecution’s assertion,<sup>10</sup> the Trial Chamber did find that the Court itself may compel the personal appearance of witnesses. This is readily apparent from the plain wording of the Decision.<sup>11</sup> The Prosecution’s assertion otherwise is based on a selective and incorrect analysis of the Decision. If granted leave to address the Prosecution’s misstatement of the Trial Chamber’s findings,

<sup>6</sup> *Prosecutor v. Bemba et al.*, Decision on Mr Fidèle Babala Wandu’s request for leave to reply to the “Prosecution opposition to the Babala Defence’s appeal against his provisional detention”, ICC-01/05-01/13-342, 15 April 2014, para. 6 (internal footnotes omitted).

<sup>7</sup> *Ibid*, para. 7.

<sup>8</sup> *Prosecutor v. Lubanga*, Decision on the Prosecutor’s “Application for Leave to Reply to ‘Conclusions de la défense en réponse au mémoire d’appel du Procureur’”, ICC-01/04-01/06-424, 12 September 2006, para. 7.

<sup>9</sup> See, e.g., Response, paras. 3 (“[a]lthough the Decision provided a “fuller analysis”...its core conclusion...was correct”), 12, 22, 49, 50. See also Response, p. 22 (“resort to [implied powers] was unnecessary in this case”).

<sup>10</sup> Response, para. 19.

<sup>11</sup> See, e.g., Decision, paras. 87 (“this principle of implied powers...is ample to justify incidental competence in a Trial Chamber to compel the appearance of witnesses”), 88 (“a Trial Chamber of an international criminal court has traditionally been given the power to subpoena the attendance of witnesses”), 100 (“there is no doubt at all in the Chamber’s view that when Article 64(6)(b) says that the Chamber may ‘require the attendance of witnesses’, the provision means that the Chamber may – as a compulsory measure – *order* or subpoena the appearance of witnesses”), 124 (“the efforts of States Parties...would have been reduced only to creating a merely ‘illusory or nominal institution – were it to be accepted that the States Parties did not intend the Court to have the power to compel the appearance of witnesses either of its own force or with the assistance of States Parties.” (emphasis added)).

the Defence will demonstrate the concomitant effect of this error on many of the arguments advanced by the Prosecution in the Response including the improper import of a definition of “enforceable summons” (which has no basis in the Decision)<sup>12</sup> and the failure to properly and fairly deal with many of the Defence’s criticisms of the Decision.<sup>13</sup>

7. The Prosecution’s extensive reliance on Article 93(1)(b) as “*an alternative basis to Articles 93(1)(d) and (l) on which the Court may issue enforceable summonses*”<sup>14</sup> is clearly improper because it goes beyond the parameters and clear terms of the Decision and seeks to import Prosecution arguments advanced, and apparently rejected, at first instance.<sup>15</sup> The Defence submits that as a matter of fairness it should be granted leave to address this new argument.

#### IV. RELIEF REQUESTED

8. For the reasons set out above, the Defence respectfully requests that the Appeals Chamber grant it leave to address the above two specific arguments raised in the Response under Regulation 28 of the Regulations.
9. Should leave be granted, the Defence requests that the time limit for filing the additional submissions be set for a date after 30 June 2014.

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<sup>12</sup> Response, para. 19. *See also* Response, paras. 54, 58.

<sup>13</sup> Response, paras. 23, 54-56, 58.

<sup>14</sup> Response, p. 20. *See also* Response, paras. 14, 44-48, 75.

<sup>15</sup> *See* Response, fn. 87 which acknowledges that Article 93(1)(b) was raised by the Prosecution before the Trial Chamber.

Respectfully submitted,



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**Karim A.A. Khan QC**

Lead Counsel for Mr. William Samoei Ruto

Dated this 25<sup>th</sup> Day of June 2014

At The Hague, Netherlands