

Cour
Pénale
Internationale



International
Criminal
Court

Original: English

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

Date: XX YY 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

Application of [INSERT NAME(S) OF STATE(S)] to file [*Amicus Curiae*][*Amici Curiae*] Briefs on the Prosecution's appeal against the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial"

Source: [INSERT STATE NAMES]

ERITREA

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 Lawyer

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Legal Representatives of the Victims
Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants
(Participation/Reparation)

The Office of Public Counsel for
Victims
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States' Representatives

Amicus Curiae
[INSERT NAMES OF STATES]

REGISTRY

Registrar
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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations
Section

Other

I. Introduction

1. The *Prosecution's appeal against the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial"* ("Appeal")¹ is currently before the Appeals Chamber.
2. Pursuant to Rule 103(1) of the Rules of Procedure and Evidence ("Rules"), the undersigned States, who are also States Parties to the Rome Statute, hereby request the Appeals Chamber to grant them leave to file an *amicus curiae* brief on the Appeal as it will, in its assistance, be of assistance for the determination of the relevant issues in the Appeal.²

II. Submissions

3. Prior to the consideration given to the issue in the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial"³ and accompanying dissent,⁴ Article 63 of the Statute, titled "Trial in the presence of the accused", had not been judicially considered by any Chamber of this Court in any detail before. The Appeal, therefore, raises for the first time before the Appeals Chamber the parameters of this article before this Court. Specifically, can such a right be waived by an accused acting in compliance with, rather than in defiance of, the Court's jurisdiction? Alternatively, is a Trial Chamber entitled to excuse an accused from his or her duty of being personally present during most of the trial in circumstances where the accused is present through counsel and is fully cooperating with the court.

¹ ICC-01/09-01/11-831.

² Rule 103(1) of the Rules provides "At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate."

³ ICC-01/09-01/11-777.

⁴ ICC-01/09-01/11-777-Anx2.

4. In the unprecedented circumstances of this case, and in addition to fair trial rights issues, the Appeal implicitly raises the issue of State cooperation. According to the Defence, "granting the request would 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 who cooperate with the court."⁵ This is an extremely important issue and one which, it is submitted, merits submissions being received by the Court from representatives of parties directly interested, that is States. Such submissions will assist the Appeals Chamber by providing information from a perspective which is not otherwise available to it.

5. If leave is granted by the Appeals Chamber, the *amicus/amici curiae* brief will be directed towards how Article 63 should be approached. The brief will address the importance of according the article an broad and flexible interpretation - one which encourages State cooperation in the widest possible set of circumstances and without jeopardising the constitutional responsibilities of leaders. The brief will also consider the balance to be struck between those subject to the Court's jurisdiction but who also occupy high office. The brief will observe that, in certain circumstances, the rights of the accused, the rights of victims, and the rights of other interested constituencies such as voters in democratic States, can all be accommodated in an effective and meaningful fashion within the Court's framework and without any negative impact on the Court's aims.

Relief Requested

For the reasons submitted above, the undersigned States respectfully request that they be granted leave to file an *amicus/amici curiae* brief on the Appeal.

⁵ Insert correct document no [], para. 37.

Respectfully submitted,

*H.E. GERMA ASMEREM
Special Envoy of the President of Permanent Representative
of the State of Eritrea to AU & EC*

[INSERT NAME]

[INSERT POSITION/TITLE]

[INSERT STATE]

Dated this xxth Day of YYY 2013

At [INSERT PLACE OF SIGNATURE]