

Dissenting Opinion of Judge Anita Ušacka

1. I respectfully disagree with the decision of my colleagues to grant leave to the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda (hereinafter: “Applicant States”) to submit observations under rule 103 of the Rules of Procedure and Evidence.

2. In their requests to submit *amici curiae* observations, the Applicant States indicate that the present appeal implicitly “raises the issue of State cooperation”¹ and that the “proper interpretation of [a]rticle 63 of the Statute is germane to the current discussion [both at the domestic and international level about whether non-State Parties such as Rwanda should] become a State Party”.² The Applicant States propose to submit observations on the importance of interpreting article 63 in a broad and flexible manner, which “encourages State cooperation in the widest possible set out circumstances and without jeopardising the constitutional responsibilities of leaders”, as well as the “balance to be struck between those subject to the Court’s jurisdiction but who also occupy high office”.³

3. It is noteworthy that the proposed observations of the Applicant States appear to be aimed at highlighting the impact of judicial decisions of the Court in terms of encouraging or discouraging State cooperation or ratification of the Rome Statute by States that are currently not party thereto. I maintain serious reservations about the appropriateness of permitting five States, four of which are party to the Statute and one which is not, to submit observations of this nature in the circumstances of the present appeal.

4. In this regard, a distinction must be drawn between the role of the judiciary, on the one hand, and the role of States Parties, on the other hand. The judiciary is bound to interpret and apply the law as set out in the Court’s legal texts and in accordance with article 21 of the Statute, while the States Parties, through the Assembly of States Parties, act as the legislative body of the Court. A strict separation between these two roles must be observed in order to

¹ Annex 1 to “Registry Transmission of document received from the United Republic of Tanzania”, ICC-01/09-01/11-918-Anx1 (OA5), para. 4; Annex 1 to “Registry Transmission of document received from The Republic of Burundi”, ICC-01/09-01/11-924-Anx1 (OA5), para. 4; Annex 1 to “Registry Transmission of document received from the Special Envoy of the President and Permanent Representative of the State of Eritrea to AU and UNECA”, ICC-01/09-01/11-926-Anx1 (OA5), para. 4; Annex 1 to “Registry Transmission of documents received from the Republic of Uganda”, ICC-01/09-01/11-928-Anx1 (OA5), para. 4.

² Annex 1 to “Registry Transmission of document received from the Republic of Rwanda”, ICC-01/09-01/11-921-Anx1 (OA5), para. 5.

³ ICC-01/09-01/11-918-Anx1 (OA5), para. 5; ICC-01/09-01/11-926-Anx1 (OA5), para. 5; ICC-01/09-01/11-924-Anx1 (OA5), para. 5; ICC-01/09-01/11-928-Anx1 (OA5), para. 5.



preserve the independence of the judiciary. In the circumstances of the present case, the intervention by five interested States of the nature proposed engenders the risk of distorting the judicial process or, at a minimum, creating the appearance that States have inappropriately encroached upon the functions of the judiciary. The present appeal raises questions of an entirely legal nature related to the scope and function of article 63 of the Statute and thus requires an independent and impartial judicial interpretation of this article and other relevant provisions.

5. It is my considered opinion that the appropriate forum for the Applicant States to address the issues outlined in their requests for leave to submit *amici curiae* observations is the Assembly of States Parties, where any discussion would engage all 122 States that are party to the Statute and would be truly representative of the views and perspectives of all of the States Parties. I note that States that are not party to the Statute may also participate as observers in the work of the Assembly of States Parties.

6. Furthermore, it is not clear from the requests filed by the Applicant States that their proposed submissions would assist the Appeals Chamber in their task of interpreting and applying the Statute. Indeed, it seems that the issues that will be addressed by the Applicant States have already been adequately canvassed by the parties to the present proceedings and I am not convinced that the proposed observations would not be repetitious of arguments and views that are already before the Appeals Chamber. It is also of relevance to note that the Applicant States appear to align themselves with the position of Mr Ruto in the present proceedings. Accordingly, in deciding whether the proposed observations would be “desirable for the proper determination of the case”, careful consideration must be given to the impact that the intervention of these five States would have on the principle of equality of arms and the balance between the parties in these proceedings.

7. Finally, I note that the present appeal proceedings are already at an advanced stage, the Prosecutor’s document in support of the appeal having been received on 29 July 2013 and Mr Ruto’s response to the document in support of the appeal having been received on 12 August 2013.⁴ It is my view that authorising five States to submit *amici curiae* observations over one month after the parties to the appeal have made their final submissions is not in the interests

⁴ “Prosecution appeal against the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’”, ICC-01/09-01/11-831 (OA5); “Defence response to the ‘Prosecution appeal against the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’””, dated 8 August 2013 and registered on 12 August 2013, ICC-01/09-01/11-846 (OA5).

of judicial economy and will unduly and unnecessarily delay the resolution of this important issue.

8. For the foregoing reasons, I am of the view that it is not desirable for the proper determination of the case to grant leave to the Applicant States to submit observations as proposed in the above-mentioned requests.

Done in both English and French, the English version being authoritative.



Judge Anita Ušacka

Dated this 13th day of September 2013

At The Hague, The Netherlands