

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/09-01/11 OA 5**

**Date: 13 September 2013**

**THE APPEALS CHAMBER**

**Before:**

**Judge Sang-Hyun Song, Presiding Judge  
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 document**

**Decision on the requests for leave to submit observations under rule 103 of the  
Rules of Procedure and Evidence**

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

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Mr Fabricio Guariglia

**Counsel for Mr William Samoei Ruto**  
Mr Karim A.A. Khan  
Mr David Hooper

**States**  
United Republic of Tanzania  
Republic of Rwanda  
Republic of Burundi  
State of Eritrea  
Republic of Uganda

**Counsel for Mr Joshua Arap Sang**  
Mr Joseph Kipchumba Kigen-Katwa  
Mr Silas Chekera

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber V(a) entitled “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial” of 18 June 2013 (ICC-01/09-01/11-777),

Having before it the requests for leave to submit *amici curiae* observations of 10 September 2013 from the United Republic of Tanzania (ICC-01/09-01/11-918-Anx1) and the Republic of Rwanda (ICC-01/09-01/11-921-Anx1) and of 11 September 2013 from the Republic of Burundi (ICC-01/09-01/11-924-Anx1), the State of Eritrea (ICC-01/09-01/11-926-Anx1) and the Republic of Uganda (ICC-01/09-01/11-928-Anx1),

Pursuant to rule 103 of the Rules of Procedure and Evidence,

*Renders*, by majority, Judge Anita Ušacka dissenting, the following

## DECISION

1. The United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda may file observations on the matters identified in the above-mentioned requests by 16h00 on Wednesday, 18 September 2013.
2. Mr Ruto and the Prosecutor may respond to any observations filed pursuant to paragraph (1) by 16h00 on Friday, 20 September 2013.

## REASONS

### I. PROCEDURAL HISTORY

1. On 18 June 2013, Trial Chamber V(a) (hereinafter: “Trial Chamber”), by majority,<sup>1</sup> Judge Herrera Carbuccia dissenting,<sup>2</sup> granted the request of William Samoei Ruto (hereinafter: “Mr Ruto”) for permission to not be continuously present in court during his trial, with the exception of specified hearings, “in order to enable

<sup>1</sup> “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”, ICC-01/09-01/11-777.

<sup>2</sup> “Dissenting Opinion of Judge Herrera Carbuccia”, ICC-01/09-01/11-777-Anx2.

him to perform his functions of state as Deputy President of Kenya, while still remaining personally subject to the jurisdiction of the Court for purposes of the inquiry into his individual criminal responsibility in respect of the crimes over which the Court has jurisdiction” (hereinafter: “Impugned Decision”).<sup>3</sup>

2. On 18 July 2013, the majority of the Trial Chamber,<sup>4</sup> Judge Eboe-Osuji dissenting,<sup>5</sup> granted the Prosecutor leave to appeal the Impugned Decision under article 82 (1) (d) of the Statute.

3. On 29 July 2013, the Prosecutor filed her document in support of the appeal.<sup>6</sup> On 8 August 2013, Mr Ruto filed his response to the Prosecutor’s document in support of the appeal.<sup>7</sup>

4. On 10 September 2013, the United Republic of Tanzania and the Republic of Rwanda filed requests to submit *amici curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence,<sup>8</sup> and on 11 September 2013, the Republic of Burundi, the State of Eritrea and the Republic of Uganda filed requests to submit *amici curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence<sup>9</sup> (hereinafter: “Requests”).

5. The United Republic of Tanzania, the Republic of Burundi, the State of Eritrea and the Republic of Uganda (hereinafter: “States Parties Applicants”) submit that the present appeal raises for the first time the parameters of article 63 of the Statute before the Court.<sup>10</sup> The States Parties Applicants submit that, if authorisation is

<sup>3</sup> Impugned Decision, paras 1-3.

<sup>4</sup> “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’”, ICC-01/09-01/11-817.

<sup>5</sup> “Dissenting Opinion of Judge Eboe-Osuji”, ICC-01/09-01/11-817-Anx.

<sup>6</sup> “Prosecution appeal against the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’”, ICC-01/09-01/11-831 (OA5).

<sup>7</sup> “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).

<sup>8</sup> Annex 1 to “Registry Transmission of document received from the United Republic of Tanzania”, ICC-01/09-01/11-918-Anx1 (OA5); Annex 1 to “Registry Transmission of document received from the Republic of Rwanda”, ICC-01/09-01/11-921-Anx1 (OA5).

<sup>9</sup> Annex 1 to “Registry Transmission of document received from The Republic of Burundi”, ICC-01/09-01/11-924-Anx1 (OA5); 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); Annex 1 to “Registry Transmission of documents received from the Republic of Uganda”, ICC-01/09-01/11-928-Anx1 (OA5).

<sup>10</sup> ICC-01/09-01/11-918-Anx1 (OA5), para. 3; ICC-01/09-01/11-926-Anx1 (OA5), para. 3; ICC-01/09-01/11-924-Anx1 (OA5), para. 3; ICC-01/09-01/11-928-Anx1 (OA5), para. 3.

granted, they will address the importance of according article 63 a broad and flexible interpretation, 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”.<sup>11</sup> For its part, the Republic of Rwanda indicates that, if authorisation is granted, it will “address the importance of according the right a broad interpretation in order to expand the writ of the Court and to enhance its effectiveness”, as well as the “competing rights and obligations which will converge when those who occupy high office become the subject of proceedings at the Court”.<sup>12</sup>

6. On 12 September 2013, Mr Ruto filed his response to the Requests (hereinafter: “Mr Ruto’s Response”).<sup>13</sup> Mr Ruto submits that “the novelty of the issues on appeal and their direct relevance to issues of State cooperation mean that the proposed observations of these States, which include non-State Parties, will be of assistance in the determination of the Appeal”.<sup>14</sup> Mr Ruto further indicates that “the Requests present the Court with the opportunity to engage with States [...] in respect of the proper interpretation of [a]rticle 63 (1)” and that such engagement is particularly apposite in light of the arguments raised by both parties.<sup>15</sup>

7. On 12 September 2013, the Prosecutor filed her response to the Requests (hereinafter: “Prosecutor’s Response”).<sup>16</sup> The Prosecutor submits that “the current issue on appeal is narrow and purely legal” and that “arguments related to the potential impact of the Appeals Chamber’s ruling on the ratification of the Rome Statute or State cooperation with the Court have no identifiable bearing on the matters *sub judice*” (footnotes omitted).<sup>17</sup> The Prosecutor indicates, however, that she “defers

<sup>11</sup> 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.

<sup>12</sup> ICC-01/09-01/11-921-Anx1 (OA5), para. 7.

<sup>13</sup> “Defence response to the requests for leave to submit *amici curiae* observations”, 12 September 2013, ICC-01/09-01/11-932 (OA5).

<sup>14</sup> Mr Ruto’s Response, para. 2.

<sup>15</sup> Mr Ruto’s Response, paras 3-5.

<sup>16</sup> “Prosecution’s consolidated response to the requests for leave to submit *amici curiae* observations in the Prosecution’s appeal against the Trial Chamber V(a)’s ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’”, ICC-01/09-01/11-934 (OA5).

<sup>17</sup> Prosecutor’s Response, para. 2.

to the Appeals Chamber's discretion" as to whether submissions from the applicants would assist it in its determination.<sup>18</sup>

## II. MERITS

8. Rule 103 of the Rules of Procedure and Evidence, regulating "Amicus curiae and other forms of submission", provides:

1. 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.

2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

9. It is at the discretion of the Appeals Chamber to grant leave to any State organization or person to submit observations.<sup>19</sup>

10. In the circumstances of the present case and given the novelty of the issues raised in the present appeal, the Appeals Chamber considers that it is desirable for the proper determination of the case to grant the applicants leave to submit observations as set out in the Requests.

11. Nevertheless, in order not to unduly delay the resolution of the matters under consideration, the Appeals Chamber considers it appropriate to set a short deadline for the receipt of the applicants' observations. Accordingly, the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda shall file their *amici curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence by 16h00 on Wednesday, 18 September 2013.

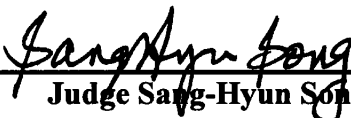
<sup>18</sup> Prosecutor's Response, para. 3.

<sup>19</sup> "Decision on the 'Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103'", 15 August 2013, ICC-01/11-01/11-404 (OA4), para. 5; "Decision on 'Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence'", 22 April 2008, ICC-01/04-01/06-1289 (OA11), para. 8; "Reasons for 'Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply'", 9 November 2009, ICC-02/05-01/09-51 (OA), para. 7.

12. Pursuant to rule 103 (2) of the Rules of Procedure and Evidence, “[t]he Prosecutor and the defence shall have the opportunity to respond to observations submitted under sub-rule 1”. Accordingly, the Appeals Chamber grants Mr Ruto and the Prosecutor until 16h00 on Friday, 20 September 2013, to respond to any observations filed by the applicants.

Judge Anita Ušacka appends a dissenting opinion in relation to this decision.

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

  
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Judge Sang-Hyun Song  
Presiding Judge

Dated this 13th day of September 2013

At The Hague, The Netherlands

### 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”<sup>1</sup> 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”.<sup>2</sup> 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”.<sup>3</sup>

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

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<sup>1</sup> 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.

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

<sup>3</sup> 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.<sup>4</sup> 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

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<sup>4</sup> “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.



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**Judge Anita Ušacka**

Dated this 13th day of September 2013

At The Hague, The Netherlands