

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 25 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

**Second 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
Federal Democratic Republic of Ethiopia
Federal Republic of Nigeria

Counsel for Mr Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

REGISTRY

Registrar
Mr Herman von Hebel

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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 observations under rule 103 of the Rules of Procedure and Evidence from the Federal Democratic Republic of Ethiopia, dated 12 September 2013 and registered on 19 September 2013 (ICC-01/09-01/11-951-Anx1) and the Federal Republic of Nigeria, dated 17 September 2013 and registered on 19 September 2013 (ICC-01/09-01/11-952-Anx1),

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

Renders the following

DECISION

The requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence are rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 18 June 2013, Trial Chamber V(a) (hereinafter: “Trial Chamber”), by majority,¹ Judge Herrera Carbuccia dissenting,² 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 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

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

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

inquiry into his individual criminal responsibility in respect of the crimes over which the Court has jurisdiction” (hereinafter: “Impugned Decision”).³

2. On 18 July 2013, the majority of the Trial Chamber,⁴ Judge Eboe-Osuji dissenting,⁵ 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.⁶ On 8 August 2013, Mr Ruto filed his response to the Prosecutor’s document in support of the appeal.⁷

4. On 13 September 2013, the Appeals Chamber granted by majority,⁸ Judge Ušacka dissenting,⁹ the requests to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence, filed by the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda.¹⁰

5. On 18 September 2013, the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda filed their joint observations¹¹ (hereinafter: “Joint Observations”).

³ Impugned Decision, paras 1-3.

⁴ “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.

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

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

⁷ “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).

⁸ “Decision on the requests for leave to submit observations pursuant under rule 103 of the Rules of Procedure and Evidence”, ICC-01/09-01/11-942 (OA 5).

⁹ “Dissenting Opinion of Judge Anita Ušacka”, ICC-01/09-01/11-942-Anx (OA 5).

¹⁰ 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); 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).

¹¹ “Joint Amicus curiae Observations of the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda on the Prosecution’s appeal against the ‘Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial’”, ICC-01/09-01/11-948 (OA 5).

6. On 19 September 2013, the Federal Democratic Republic of Ethiopia and the Federal Republic of Nigeria filed requests to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence¹² (hereinafter: “Requests”). The Federal Democratic Republic of Ethiopia and the Federal Republic of Nigeria (hereinafter: “Applicants”) submit that the present appeal raises for the first time the parameters of article 63 of the Statute before the Court.¹³ The Applicants further submit that, if authorisation is 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”.¹⁴

7. Following an order from the Appeals Chamber,¹⁵ Mr Ruto and the Prosecutor filed their responses¹⁶ (hereinafter: “Mr Ruto’s Response” and “Prosecutor’s Response”, respectively) to the Requests.

8. 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 two States, which include a non-State Party, will be of assistance in the determination of the Appeal”.¹⁷ Mr Ruto further indicates that “[t]he 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.¹⁸

¹² Annex 1 to “Registry Transmission of document received from the Federal Democratic Republic of Ethiopia”, dated 12 September 2013 and registered on 19 September 2013, ICC-01/09-01/11-951-Anx1 (OA5); Annex 1 to “Registry Transmission of document received from the Federal Republic of Nigeria”, dated 17 September 2013 and registered on 19 September 2013, ICC-01/09-01/11-952-Anx1 (OA5).

¹³ ICC-01/09-01/11-951-Anx1 (OA5), para. 3; ICC-01/09-01/11-952-Anx1 (OA5), para. 3.

¹⁴ ICC-01/09-01/11-951-Anx1 (OA5), para. 5; ICC-01/09-01/11-952-Anx1 (OA5), para. 5.

¹⁵ “Order on the filing of responses to requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence”, ICC-01/09-01/11-962 (OA 5).

¹⁶ “Defence response to the requests from the Federal Democratic Republic of Ethiopia and the Federal Republic of Nigeria for leave to submit amici curiae observations”, 23 September 2013, ICC-01/09-01/11-976 (OA 5); “Prosecution Consolidated Response to additional requests for leave to submit amicus curiae observations in the Prosecution appeal against the ‘Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial’”, 23 September 2013, ICC-01/09-01/11-979 (OA 5).

¹⁷ Mr Ruto’s Response, para. 2.

¹⁸ Mr Ruto’s Response, para. 5.

9. The Prosecutor submits that “contrary to the Requests, the appeal does not ‘implicitly raise [] the issue of State cooperation’”.¹⁹ The Prosecutor further submits that “the States’ proposed submissions are likely to mirror those filed on 18 September 2013”²⁰ and that “[a]s the Requests are identical or substantially similar to prior requests, the Appeals Chamber can reasonably envision that the proposed submissions will duplicate the recently received Observations” (footnote omitted).²¹ The Prosecutor indicates, however, that, in line with her earlier position, she “defers to the Appeals Chamber’s discretion” as to whether submissions from the applicants would assist it in its determination.²²

II. MERITS

10. 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.

11. It is at the discretion of the Appeals Chamber to grant leave to any State, organisation or person to submit observations.²³

¹⁹ Prosecutor’s Response, para. 2.

²⁰ Prosecutor’s Response, para. 3.

²¹ Prosecutor’s Response, para. 3.

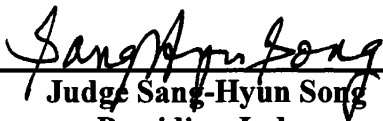
²² Prosecutor’s Response, para. 4.

²³ “Decision on the requests for leave to submit *amici curiae* observations”, 13 September 2013, ICC-01/09-01/11-942 (OA 5), para. 9; “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. The Appeals Chamber notes that the Applicants submit that, if authorisation is 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”.²⁴ The Appeals Chamber notes that the Joint Observations received on 18 September 2013 were made on precisely the same issues. In these circumstances and to avoid any unnecessary delay given the advanced stage of these appeals proceedings, the Appeals Chamber does not consider it “desirable for the proper determination of the case” within the meaning of rule 103 of the Rules of Procedure and Evidence to grant the Applicants leave to submit observations as set out in the Requests.

Judge Anita Ušacka appends a partly separate opinion to this decision.

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



Judge Sang-Hyun Song
Presiding Judge

Dated this 25th day of September 2013

At The Hague, The Netherlands

²⁴ ICC-01/09-01/11-951-Anx1 (OA5), para. 5; ICC-01/09-01/11-952-Anx1 (OA5), para. 5.

Partly Separate Opinion of Judge Anita Ušacka

I agree with the approach taken by the Appeals Chamber to reject the pending applications because they appear to be repetitive of the observations already received. However, my main reasons for rejecting the two applications to submit observations pursuant to rule 103 of the Rules of Procedure are those expressed in my Dissenting Opinion to the “Decision on the requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence” rendered on 13 September 2013 (ICC-01/09-01/11-942-Anx).

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



Judge Anita Ušacka

Dated this 25th day of September 2013

At The Hague, The Netherlands