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

Date: **3 October 2013**

APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kouroula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR *v.* WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG**

Public

Prosecution's request pursuant to Regulation 28(2)

Source: Office of the Prosecutor

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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1. Pursuant to Regulation 28(2), the Prosecution invites the Appeals Chamber to order the Prosecution to make limited clarifications within one working day in the Appeal against the Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute.

Submissions

2. On 6 September 2013, the Single Judge in the case of the *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* certified the following issue for appellate review: "[w]hether the Single Judge erred in interpreting the term "permission" referred to in article 61(9) of the Statute so as to include factors relevant to the specificities of the case when exercising her discretion; and whether, consequently, in this particular case, the Single Judge abused her discretion in rejecting the Amendment Request" (the "Issue").¹
3. On 19 September 2013, the Prosecution filed its appeal against the "Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute" ("Prosecution's Appeal").² On 30 September 2013, the Defence of Mr. Ruto ("Ruto Defence Response")³ and the Defence of Mr Sang ("Sang Defence Response")⁴ filed their responses to the Prosecution's Appeal.
4. The Ruto Defence Response states, *inter alia*, that the Prosecution did not "expressly identify the Issue actually certified for appeal or focus its arguments

¹ ICC-01/09-01/11-912, para.67.

² ICC-01/09-01/11-956 OA6.

³ ICC-01/09-01/11-999 OA6.

⁴ ICC-01/09-01/11-1001 OA6.

on the same” and that the Prosecution “jettison[ed] the Issue certified for appeal in favour of one it considers more convenient”.⁵

5. The Prosecution submits that the above is a serious mischaracterization which may hamper an accurate assessment of the submissions of the parties. Hence, the Prosecution invites the Appeals Chamber to order the Prosecution to make further submissions on this limited but crucial point.
6. Regulation 28 (2) provides that a Chamber may “order the participants to address specific issues in their written or oral submissions within a time limit specified by the Chamber.” The Appeals Chamber has held in this context that

“should the arguments that are 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, the Appeals Chamber will issue an order to that effect pursuant to regulation 28 (2) of the Regulations of the Court, bearing in mind the principle of equality of arms and the need for expeditious proceedings.”⁶

7. The Prosecution submits that a proper appraisal of the relationship between the issue certified for Appeal and the submissions made by an Appellant is indispensable for the “proper disposal of the appeal” within the meaning of Regulation 28(2). Since these additional submissions can be made within one working day in a brief submission they will not impact on the expeditious conduct of proceedings.
8. If the Appeals Chamber issues the order requested above, the Prosecution will explain how its Appeal falls squarely within the Issue. The Prosecution notes in this context that the Single Judge’s definition of the Issue relates to the interpretation of the term “permission” referred to in Article 61(9), as well as the “factors” that the Single Judge ought to consider in order to grant or deny such permission. The Prosecution will clarify how the identification of the relevant

⁵ Ruto Defence Response, para.19. See also paras.18, 20, 25.

⁶ ICC-01/04-01/06-424, para.7.

criteria or factors that a Pre-Trial Chamber needs to consider under Article 61(9) to amend the charges, forms a core part of the Prosecution's Appeal⁷

9. The Prosecution will also explain why the Single Judge's reference to "the specificities of the case" as a factor that she considered does not bar the Prosecution from submitting that additional factors ought to have been considered by the Single Judge in making her decision.

Relief Sought

10. For the above reasons, and mindful of the Appeals Chamber's discretionary powers, the Prosecution invites the Appeals Chamber to request from the Prosecution limited clarifications within one working day in the Appeal against the Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute.



Fatou Bensouda, Prosecutor

Dated this 3rd day of October 2013

At The Hague, the Netherlands

⁷ See for example paragraphs 9 to 12 of the Prosecution's Appeal.