

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 17 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

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"

Source: Republic of Rwanda
United Republic of Tanzania
Republic of Burundi
State of Eritrea
Republic of Uganda

No. ICC-01/09-01/11

1/8

17 September 2013

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

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I. Introduction

1. On 13 September 2013, the Appeals Chamber of the International Criminal Court, by majority,¹ granted leave to the United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda (collectively "*Amici Curiae*") to submit *amicus curiae* observations pursuant to Rule 103 of the Rules of Procedure and Evidence on the issues identified in the respective requests of the *Amici Curiae*.² In view of the Appeals Chamber's statement that the matters under consideration should not be unduly delayed,³ and for sake of efficiency, the *Amici Curiae* hereby jointly submit their observations on how Article 63 of the Rome Statute should be approached in circumstances where a cooperating accused individual concurrently holds a high governmental office in a State Party or non-State Party.

2. As foreshadowed in the respective applications of the *Amici Curiae*, the *Amici Curiae* submit that Article 63 should be interpreted in a broad and flexible manner that encourages State cooperation in the widest possible set of circumstances and without endangering the constitutional obligations of the highest office holders, which impacts and concerns the State as a whole. The majority Decision of Trial Chamber V(A) granting the request of His Excellency William Samoei Ruto, the Deputy President of the Republic of Kenya (hereinafter "*the Respondent*") to be excused from continual presence at his trial ("*Decision*")⁴ recognized that the interests of international justice and those of a State and its citizens to an effective and functioning elected national government need not be competing ones. The Trial Chamber accordingly found that the "*exceptional circumstances*" presented by the Respondent's

¹ICC-01/09-01/11-942(HerHonor, Judge Ušacka, issued a dissenting opinion (ICC-01/09-01/11-942-Anx).

²United Republic of Tanzania (ICC-01/09-01/11-918-Anx1), Republic of Rwanda (ICC-01/09-01/11-921-Anx1), Republic of Burundi (ICC-01/09-01/11-924-Anx1), State of Eritrea (ICC-01/09-01/11-926-Anx1) and Republic of Uganda(ICC-01/09-01/11-928-Anx1)

³ICC-01/09-01/11-942, para.11 (setting a deadline of 16h00 on 18 September 2013 for submission of the *amicus curiae* observations).

⁴ICC-01/09-01/11-777.

situation as an individual with "important functions of an extraordinary dimension to perform" as a Deputy Head of State justified his being excused from continual presence at trial on condition that the Respondent appears before the Chamber whenever it so required.

3. The Amici Curiae submit that the Trial Chamber's Decision, in addition to being strictly correct in interpreting and applying the relevant provisions of the Rome Statute,⁵ also comports with the Preamble of the Rome Statute, which sets out that the States Parties are "*Resolved to guarantee lasting respect for and the enforcement of international justice*". In the respectful submission of the Amici Curiae, lasting respect for and the enforcement of international justice are undoubtedly better guaranteed where a high officer holder of a State who also appears on a summons as an accused before the ICC does not have to consider the unnecessary and false choice that is raised by the Prosecutor's Appeal.⁶ Namely, on the one hand, an accused person's respect for and obligation to comply with international law, and on the other the national constitutional obligations of such a person to effectively carry out the duties of the office they were elected to for the benefit of the nation as a whole.

4. The Trial Chamber's reasoned approach to the interpretation and application of Article 63 and other relevant provisions of the Rome Statute respects and upholds both the interests of international justice, including the interests of victims, and the legitimate interests of a State and its citizenry. The Trial Chamber's Decision, if sustained by the Appeals Chamber, will encourage greater cooperation not only from States Parties, but will be viewed positively by non-States Parties including those States considering whether to sign and ratify the Rome Statute. The Court works on the basis of consent and mutual

⁵The are, *inter alia*, Articles 27, 63, 64, 66 and 67.

⁶ICC-01/09-01/11-831.

respect. Without this, the Court will be diminished and work far less effectively that hoped for by the drafters of the Rome Statute. The mechanistic requirement of continuous presence at the seat of the Court – in the case of an elected head of state or deputy head of state who cooperates with the Court and who appears on a summons - would deprive the electorate of the best government they are entitled to. The Court needs to be slow to sanction government via “remote control” from a foreign capital and needs to be flexible and confident enough to realise that the Rome Statute is adaptable and mature enough to operate effectively in the manner detailed in the Decision. Ritualistic justice requiring the physical presence of an accused at all stages is to be repudiated and cannot withstand scrutiny. The Trial Chamber decision properly balances the various competing interests and their findings appear well within the legitimate choices available to it.

II. Submissions

5. In its Appeal, the Prosecution stated that because, “[a]s a matter of policy, the Prosecution focuses its investigations on persons who bear the greatest responsibility for the most serious crimes under the Statute”, “[i]t is therefore foreseeable that future accused will hold functions that may make the Majority’s test applicable to them”.⁷ The Prosecution submitted that in view of this reality, “[e]ven assuming, *arguendo*, that the Majority’s test had a basis in the law of this Court, it is still the wrong standard because it invites a flood of excusal applications from accused who do not wish to attend trial”.⁸
6. The *Amici Curiae* limit their observations to accused persons like the Respondent, with respect to whom there can be little doubt as to the “important functions of an extraordinary dimension” that must be performed.

⁷ICC-01/09-01/11-831, para. 38.

⁸ICC-01/09-01/11-831, para. 37.

A Head or Deputy Head of State or Government, depending on the State in question, are responsible for the security and well-being of their entire population through ensuring an effective and functioning national government. It is self evident that the positions of Head or Deputy Head of State or Government are ones of singular importance – truly ‘round-the-clock’ roles – that reflect the electoral voice of a State as a whole.

7. In circumstances such as those presented by the case under consideration, where the accused has unequivocally cooperated in full at all times with the ICC, the *Amici Curiae* submit that the test articulated by the Trial Chamber is legally justified and appropriate within the framework of the Rome Statute, including the Preamble thereto. The interests of international justice, including those of the victims of these most serious of crimes over which the Court may exercise jurisdiction are fully respected. The process of criminal justice for such victims cannot truly begin until a suspect has appeared before the relevant judicial body – either voluntarily or through the execution of an arrest warrant.

8. An approach to Article 63 of the Statute that does not present future accused persons like the Respondent with the unnecessary and false choice between the ICC process of justice and national constitutional obligations will encourage greater cooperation with the Court and enhance the system of international justice by demonstrating to States Parties and non-States parties alike that the ICC recognizes that it does not exist or act in a vacuum – that the high-minded ideals and imperatives of justice through the ICC process may be achieved in a manner that also respects the electoral will of a population and the critical need for effective and functioning government. It will be of little – or inadequate – comfort to the citizenry that elects an accused who is a head of state or deputy head of state to see them acquitted after a trial process that could take years - if this is at the cost of the most effective government to which they are entitled.

Nor is there any reason in law or practice that prevents such an accused discharging responsibilities by being present in the country that elected them – subject to the control of a Trial Chamber of the ICC that excuses their attendance. Such a Trial Chamber can also require the attendance of such persons - and the Decision which the Prosecution seeks to impugn has precisely that in built flexibility and adaptability essential to ensuring justice in each individual case.

9. The Trial Chamber's Decision does exactly this. The Respondent remains under the jurisdiction of the Court and is required to appear for specified portions of the trial, as well as at any other time the Trial Chamber so requires. He will be represented by and will consult with his defence counsel and the process of ICC justice for the victims of Kenya's 2007-2008 post-election violence moves forward. At the same time, under the Decision, the democratic interests of the Kenyan people as a whole are protected and respected. The Kenyan people's elected representative to the second-highest office in the Republic is better able to carry out his "important [constitutional] functions of an extraordinary dimension" by being permitted to be absent from continual presence at his trial in the manner permitted in the Decision.

10. In the respectful submission of the *Amici Curiae*, the aims of the Court are enhanced rather than diminished by the Trial Chamber's Decision. The *Amici Curiae* respectfully observe that the Appeals Chamber upholding of the Decision will be in accordance with the framework of the Rome Statute, including its preamble, and will encourage the highest office holders in States Parties and non-States Parties alike to fully cooperate with the Court in the future.



Respectfully submitted,



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At Kigali, Rwanda

For and on behalf of:

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Dated this 17th Day of September 2013