ANNEX:

EXPLANATORY NOTE

1. On 5 June 2014, the Defence for Joshua arap Sang ("Defence") submitted its *Defence Appeal against the Decision on the Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation* ("Sang Appeal").[1]

2. On 20 June 2014, the Prosecution filed its *Consolidated Response to Mr. Ruto and Mr. Sang's appeals against the "Decision on the Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation"*,[2] in which it pointed out that the Sang Defence had exceeded the word limit of 300 words per page.[3]

3. In light of the Appeals Chamber's *Decision on requests of Mr William Samoei Ruto and Mr Joshua Arap Sang for extension of page limit for their documents in support of the appeal*,[4] the Defence hereby submits a Corrigendum to the Sang Appeal. The word count, excluding the cover page and notification page, of the amended document is now 7,405 words, which brings the average number of words to approximately 300 words per page in compliance with regulation 36(3) of the Regulations of the Court.

4. The Defence deletes the following parts:

- At paragraph 1, second half: ", whereby the Majority of the Trial Chamber, Judge Carbuccia dissenting, granted the Office of the Prosecutor's ("Prosecution's") application to issue a request to the Government of Kenya ("GOK") to summon eight witnesses and enforce said summons".

- At paragraph 4: "it is well established that the appeal is not *de* novo, but instead is corrective in nature.[5] On the discretion of the Appeals Chamber to consider the applicable law and derive its own interpretation, it was held in *Banda and Jerbo* that the Appeals Chamber may render its own interpretations of the law and is not bound by the determinations of the Trial Chamber at first instance.[6]"

- At paragraph 5: "If an error of law is established," – and changes the lowercase 't' into a capital 'T'.

[1] ICC-01/09-01/11-1344 OA7.
[2] ICC-01/09-01/11-1380 OA7 OA8.
[3] *Ibid*, paras 77, 78.
[4] ICC-01/09-01/11-1335 OA7 OA8.
[5] ICC-02/05-03/09-295 OA2, 17 February 2012, para 20.
[6] *Ibid*. Quoted with approval by the Appeals Chamber in ICC-01/04-01/10-514 OA4, 30 May 2012, para 15.

- Paragraphs 6, 7, 8 in their entirety.

- At paragraph 11, first half: "An argument raised by the Defence, to which little attention was paid in the Impugned Decision, is that Article 64(6)(b) is for internal, rather than external, use. In other words, the argument is that Article 64(6)(b) does not grant the Chamber a power to reach out to unwilling witnesses and compel them to testify, but rather applies when the parties have no intention of calling one or more witnesses the Chamber would like to hear. In such a situation, the Chamber can rely on Article 64(6)(b) to call witnesses itself. Alternatively, the Chamber may require the re-calling of witnesses who previously testified. However,"

- At paragraph 12, last sentence: ""Context" is defined in Article 31(2) to include "… the text, including its preamble and annexes". Clearly then, "context" covers other provisions of the treaty.[7]"

- At paragraph 17, second half: "pursuant to which "States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecution: … (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court.""

- Paragraph 20 in its entirety.

- At paragraph 28, second half: "Article 93(1)(l) provides that States Parties shall provide "[a]ny other type of assistance which is not prohibited by the law of the requested State" (emphasis added). In the Majority's view such other types of assistance shall include facilitating the involuntary appearance of persons as witnesses or experts before the Court, unless expressly prohibited by the law of the requested State.[8] The Minority Judge, on the other hand, holds that Article 93(1)(e) cannot be displaced and overridden by recourse to the more general, catch-all provision contained in Article 93(1)(l).[9]"

[7] Jiménez De Aréchaga, as quoted in Damrosch, L. et al (eds), *International Law: Cases and Materials* (5th ed, 2009), 173.
[8] *Ibid*.
[9] ICC-01/09-01/11-1274-Anx, para 16.

- At paragraph 29, last line: ": a special rule prevails over a general rule"

- At paragraph 31, last part: "In this sense, international organisations (of a primarily administrative nature) and courts without such intrusive powers as criminal courts enjoy more leeway to use such tools of interpretation and means of expanding jurisdiction. Accordingly, it is submitted that jurisprudence of the ICJ concerning the implied powers of international organisations is of limited value."

- At paragraph 34, last part of the quote:

  "…. Since article 4 para. 2 establishes that the functions and powers have to be provided for in this Statute, the provision leaves no room for the application of any such broad construction that could encroach upon the sovereignty of the States Parties."

- At paragraph 36, last sentence: "or analyse the … raised by the Defence in their additional joint submissions"

- At paragraph 42, in last sentence: ", as recognised by the Minority Judge,"

- At paragraph 43, first part: "The Majority discusses at length the principles set out in Articles 31 and 32 of the VCLT, most notably the principle of 'good faith', with reference to the object and purpose of the Rome Statute.[10] In the Majority's view, the principle of 'good faith' supports its finding that it has the power to compel witnesses to testify. In the Majority's view, the 'good faith' principle must be considered in light of the objective of fighting impunity.[11]"

- At paragraph 45, last sentence: "The interpretation of the relevant legal provisions advanced by the Defence is not "unreasonable, absurd or contradictory" nor does it lead to "impossible consequences".[12]"

[10] Note that "'object and purpose' are part of the context, the most important one, but not an autonomous element in interpretation, independent of and on the same level as the text": De Aréchaga, J., as quoted in Damrosch, L. et al (eds), *International Law: Cases and Materials* (5th ed, 2009), 173.
[11] ICC-01/09-01/11-1274-Corr2, paras 63-64, 99 and 128.
[12] CC-01/09-01/11-1274-Corr2, para 124.

- At paragraph 50, last sentence: "The Defence relies on submissions made before the Trial Chamber as to the vertical nature and primary jurisdiction of the ICTY and ICTR, as opposed to the horizontal nature and concurrent jurisdiction of the ICC, and the consequences thereof."

- At paragraph 56, first part: "Pursuant to Article 21(1)(a), the Court shall "[i]n the first place" apply "this Statute, Elements of Crimes and its Rules of Procedure and Evidence". In the second place, and only where appropriate, the Court shall apply "applicable treaties and the principles and rules of international law, including the established principles of international law of armed conflict."[13] Finally, the Court shall apply "general principles of law derived by the Court from national laws of legal systems… provided that those principles <u>are not inconsistent with this Statute</u> and with international law and internationally recognised norms and standards".[14] Accordingly," – and changes the lowercase 'i' into a capital 'I'.

- At paragraph 57, in the first sentence: ", which has been adopted by various other institutions – though not by the ICC –"

- At paragraph 60, last line: "as is required to satisfy the first limb of customary international law"

- At paragraph 61, in second half: "This is an aspect unique to the ICC." ….. "Consequently, States have little choice but to cooperate."

- At paragraph 62, first half: "The Majority, however, is of the view that, as a result of the complementarity principle, the Court should be at par with domestic courts in terms of effectiveness and should be in no weaker position to conduct criminal trials.[15] However, the Majority's solution does not solve the dilemma of having a Court that is weaker than its member States."

5. In addition, the Defence amends the following footnotes:

- In footnote 89 (now footnote 72) "para 91" is replaced by: "paras 65 and 91".

[13] Article 21(1)(b).
[14] Article 21(1)(c).
[15] ICC-01/09-01/11-1274-Corr2, paras 134-140.

- In footnote 6 (now footnote 4), "*Ibid*" is replaced by: "ICC-02/05-03/09-295 OA2, 17 February 2012, para 20."

Respectfully submitted,

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On behalf of Mr. Joshua arap Sang
Dated this 26th day of June 2014
In Nairobi, Kenya