



The African Union
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H.E. Hailemariam Desalegn
Prime Minister of the Federal Democratic Republic of Ethiopia
Chairperson of the African Union

H.E. Dr. Nkosazana Dlamini Zuma
Chairperson of the African Union Commission

Reference: 2013/PRES/00295-4/VPT/MH

Date: 13 September 2013

Excellencies,

I have the honour to refer to your letter of 10 September 2013 (Ref. BC/U/1657/09/13) addressed to Judge Sang-Hyun Song, President of the International Criminal Court.

I note that your letter follows an earlier letter of 8 July 2013 (which reached the ICC Presidency on 29 July 2013) and a 5 August 2013 reply by President Song, both of which I have enclosed for the sake of clarity and ease of reference.

Since your letter directly discusses the merits of an appeal pending before the ICC's Appeals Chamber, on which the Court's President and First Vice-President sit, I will hereby reply to your letter on behalf of the Court's Presidency in my capacity as Second Vice-President.

I would be most grateful if you could kindly convey a copy of this reply to the Heads of State and Government of Member States of the African Union who received a copy of your letter.

It seems that your letter addresses two main sets of issues, which I will address below.

Firstly, you refer to the letter of 8 July 2013, stating that it conveyed “the decision of the 21st ordinary session of the Assembly of Heads of State and Government of the African Union in which a request was made for referral of the ICC investigations and prosecutions in relation to the 2007 post-election violence in Kenya, in line with the principle of complementarity, to allow for a national mechanism to investigate and prosecute the cases under a reformed Judiciary...”. You also seem to express your hope and expectation that the “request of the AU” will be “considered and clearly responded to”.

I regret to inform you that the Decision of the Assembly of the African Union as such does not constitute a request to the Court in accordance with the Court’s legal framework. As President Song conveyed to you earlier, the Court is only able to consider requests properly raised in front of the relevant Chamber in accordance with the applicable legal procedures.

Indeed, since the admissibility challenges made by the Kenyan government in 2011 – which were ruled on more than two years ago – no request for the deferral of any ICC proceedings in the Kenya situation to the Kenyan national jurisdiction has been made to the relevant Chambers by any party or participant to the proceedings. Accordingly, the Court is not seized of any such request. The cases will proceed before the ICC in the absence of any issue that would trigger a decision to the contrary in accordance with the Court’s legal framework.

Secondly, your letter comments on a number of issues related to the on-going proceedings before the ICC in the Kenya situation, particularly in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*. Again, I would like to stress that the Court is only able to consider requests properly raised in front of the relevant Chamber in accordance with the applicable legal procedures.

The Presidency has no legal powers under the Rome Statute or the subsidiary legal documents to consider the arguments and concerns raised in your letter with respect to an on-going case before the Court, nor can the Presidency convey them to the relevant Chambers.

For the Chambers seized of the case *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* to consider the arguments contained in your letter, they would have to be formally brought to the attention of the relevant Chambers. This could be done by a party or a participant to the proceedings. Furthermore, pursuant to Rule 103 of the Rules of Procedure and Evidence, States or organizations can seek leave to submit observations to a Chamber, as has indeed been recently done by several African States within the context of the case in question.

Allow me to reiterate in the clearest terms that the matters raised in your letters – or in the Decision of the Assembly of the African Union – can only be considered by the Court in the context of concrete proceedings if they are properly raised before the relevant Chambers in accordance with the procedures laid down in the Rome Statute and other relevant documents.

I assure you that the Court has no reason whatsoever to harm the interests of any State Party in any way; quite the contrary.

That said, I am sure you appreciate that the Judges of the Court must take all their decisions in accordance with the mandate and legal framework established by the States that created the Court – including the 34 African States that are party to the Rome Statute. Within these legal boundaries, the Court remains fully committed to friendly and cooperative relations with the African Union in the spirit of our shared values.

Excellencies, please accept the assurances of the Court's highest consideration for the African Union as well as its Member States.

A handwritten signature in blue ink, appearing to read 'Cuno Tarfusser', is centered on the page.

Judge Cuno Tarfusser
Second Vice-President

Copy:

H.E. Mr. Ban Ki-moon, Secretary-General of the United Nations

H.E. Ambassador Tiina Intelmann, President of the Assembly of States Parties to the Rome Statute

Their Excellencies, the Heads of State or Government of the Member States of the African Union