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

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**APPEALS CHAMBER**

**Before:** Judge Sanji Mmasenono Monageng  
Judge Sang-Hyun Song  
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**

**Urgent Sang Defence Application for an Extension of the Page Limit for the  
Defence's Appeal against the "Decision on Prosecutor's Application for Witness  
Summonses and resulting Request for State Party Cooperation"**

**Source:** Defence for Mr. Joshua arap Sang

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

**The Office of the Prosecutor**

Fatou Bensouda, Prosecutor  
James Stewart, Deputy Prosecutor  
Anton Steynberg, Senior Trial Attorney

**Counsel for William Ruto**

Karim Khan QC, David Hooper QC  
Shyamala Alagendra and Essa Faal

**Counsel for Joshua Sang**

Joseph Kipchumba Kigen-Katwa  
Caroline Buisman

**Legal Representatives of the Victims**

Wilfred Nderitu

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

Orchlon Narantsetseg

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

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**Registrar**

Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Patrick Craig

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## **I. INTRODUCTION**

1. Pursuant to Regulation 37(2) of the Regulations of the Court, the Defence for Mr. Joshua arap Sang (“Defence”) requests an extension of the page limit to 40 pages for its appeal against the *Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation* (“Impugned Decision”).<sup>1</sup>
2. The Defence submits that exceptional circumstances, as required by Regulation 37(2), exist and justify the requested extension.

## **II. PROCEDURAL HISTORY**

3. On 18 November 2013, the Office of the Prosecutor (“Prosecution”) applied for an extension of the page limit for its then imminent application to request Trial Chamber V(A) (“Trial Chamber”) to issue a request to the Government of Kenya to summon certain witnesses and if necessary produce them before the Court.<sup>2</sup> On 20 November 2013, the Trial Chamber granted that application for an extension of the page limit – to 39 pages – due to the novelty and complexity of the issues.<sup>3</sup>
4. On 29 November 2013, the Prosecution filed the *Prosecution’s request under article 64(6)(b) and article 93 to summon witnesses*.<sup>4</sup>
5. On 2 January 2014, the Defence requested an extension of the page limit for its response to the Prosecution’s request to summon witnesses.<sup>5</sup> The Trial Chamber granted that request on 7 January 2014, noting that “the novelty, complexity and the number of the legal and factual issues that guided its consideration in granting the Prosecution’s request for extension of page limit in relation the

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<sup>1</sup> Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274, 17 April 2014.

<sup>2</sup> Prosecution request for an extension of page limit, ICC-01/09-01/11-1103-Conf, 19 November 2013.

<sup>3</sup> Decision on the Prosecution’s request for extension of the page limit, ICC-01/09-01/11-1106-Conf, 20 November 2013.

<sup>4</sup> ICC-01/09-01/11-1120-Conf-Red-Corr2.

<sup>5</sup> Sang Defence request for an extension of the page limit, ICC-01/09-01/11-1131, 2 January 2014.

Application equally apply to the issues the Sang Defence intends to raise in its response.”<sup>6</sup>

6. On 17 April 2014, the Majority of the Trial Chamber granted the Prosecution’s application to issue a request to the Government of Kenya to summon witnesses and enforce said summons in the Impugned Decision.
7. Following Defence applications for leave to appeal the Impugned Decision under Article 82(1)(d) of the Rome Statute,<sup>7</sup> the Majority of the Trial Chamber (the Presiding Judge dissenting) granted leave to appeal in respect of two issues:
  - i. Whether a chamber has the power to compel the testimony of witnesses (‘First Issue’);
  - ii. Whether the Government of Kenya, a State party to the Rome Statute, is under an obligation to cooperate with the Court to serve summonses and assist in compelling the appearance of witnesses subject to a subpoena (‘Second Issue’).<sup>8</sup>

### **III. APPLICABLE LAW**

8. Regulation 37(2) provides:
  1. A document filed with the Registry shall not exceed 20 pages, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.
  2. The Chamber may, at the request of a participant, extend the page limit in exceptional circumstances.
9. In the context of appeals, exceptional circumstances justifying an extension of the page limit have been found to exist because of the nature of the issue/s on appeal and thus the type of submissions required to address those issues;<sup>9</sup> the novelty of

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<sup>6</sup> Decision on the Sang Defence request for an extension of the page limit, ICC-01/09-01/11-1134, 7 January 2014, para 4.

<sup>7</sup> Sang Defence Request for Leave to Appeal the Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1293, 5 May 2014; (Ruto) Defence application for leave to appeal the “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State party Cooperation”, ICC-01/09-01/11-1291, 5 May 2014.

<sup>8</sup> Decision on defence applications for leave to appeal the “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State party Cooperation” and the request of the Government of Kenya to submit amicus curiae observations, ICC-01/09-01/11-1313, 23 May 2014, para 40.

<sup>9</sup> For example, see: *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the urgent request for an extension of page limit pursuant to regulation 37(2) of the Regulations of the Court, ICC-01/04-01.07-1546, 21 October 2009, para 4.

the issue/s and degree of complexity;<sup>10</sup> the number of issues;<sup>11</sup> and the need to provide sufficient factual detail on appeal.<sup>12</sup>

#### IV. SUBMISSIONS

10. The two issues certified for appeal by the Trial Chamber deal with a variety of complex and novel legal areas. The appeal will require analysis of the nature and structure of the Rome Statute's cooperation regime, the relationship between Articles 64(6)(b) and 93(1), the intention of the drafters of the Rome Statute, treaty interpretation, implied powers, customary international procedural law and Kenyan domestic law. These issues cannot be comprehensively addressed in 20 pages.
11. Moreover, while only two issues were certified for appeal, as recognised by the Majority of the Trial Chamber in granting leave to appeal, those issues subsume various other issues raised by the Defence in their respective applications, including: whether existing international human rights standards prohibit the Government of Kenya from assisting in the manner requested;<sup>13</sup> and whether the Rome Statute's complementarity regime allows Judges to interpret a State party's Constitution and legislation, notwithstanding the fact that interpretation of the Constitution and such laws is expressly reserved for domestic courts.<sup>14</sup>
12. The complexity of the issues involved was previously recognised by the Trial Chamber in granting extensions to the page limit at first instance. Additionally, the Impugned Decision itself is a lengthy 78 pages. The complex and controversial nature of the issues on appeal is further recognised by the fact the Trial Chamber was divided on the question of whether the Government of Kenya

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<sup>10</sup> *The Prosecutor v. Thomas Lubanga Dylio*, Judgment on the appeals of Mr Lubanga Dylio and the Prosecutor against the Decision of Trial Chamber 1 of 14 July 2009, entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2205 OA15 OA16, para.21; *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para 4.

<sup>11</sup> *The Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecution Request for extension of page limit, ICC-01/04-01/10-248, 24 June 2011, page 3.

<sup>12</sup> *Situation in the Republic of Kenya*, Decision on the Prosecutor's Request for Extension of Page Limit, ICC-01/09-27, 4 April 2011, para 4.

<sup>13</sup> ICC-01/09-01/11-1313, para 41, with reference to para 13(iii).

<sup>14</sup> ICC-01/09-01/11-1313, para 42, with reference to para 20(iv)(a).

could be requested to enforce a summons and compel witnesses to appear, as per Judge Carbuccia's dissent.<sup>15</sup>

13. The ability of a Trial Chamber to request a State Party to summon witnesses and enforce such summons is a fundamental question that has not yet been considered by the Appeals Chamber. It is submitted that given the importance of the appeal, not only for the trial proceedings in the present case, but also for proceedings before the International Criminal Court more generally, it is in the interests of justice to allow the Defence to advance its arguments in proper detail.
14. If the requested extension of the page limit were granted, the Defence would not oppose a similar extension of the page limit being granted to the Prosecution in order to respond to the appeal. The same novel, important and complex legal issues confront both parties to the proceedings.

**V. RELIEF REQUESTED**

15. That in light of the exceptional circumstances outlined above, the page limit for the Defence's appeal be extended to 40 pages.



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Joseph Kipchumba Kigen-Katwa  
On behalf of Mr. Joshua arap Sang  
Dated this 29th day of May 2014  
In Nairobi, Kenya

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<sup>15</sup> ICC-01/09-01/11-1274-Anx, 29 April 2014.