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

Date: 10 June 2014

APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
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

**Sang Defence Response to Ruto Defence Request for Suspensive Effect of
“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
Helen Brady, Appeals Counsel
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

The Government of Kenya

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. On 17 April 2014, Trial Chamber V(A) issued its *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation* ("Impugned Decision").¹
2. On 23 May 2014, the Majority of the Trial Chamber, the Presiding Judge dissenting, granted both the Defence for Mr. Sang ("Defence") and the Defence for Mr. Ruto ("Ruto Defence") leave to appeal the Impugned Decision.²
3. On 5 June 2014, both Defence teams submitted their appeal briefs against the Impugned Decision.³ In its Appeal, the Ruto Defence, pursuant to Article 82(3) and Rule 156(5), asked for partial suspensive effect of the decision, namely in relation to those parts specifically compelling witnesses to testify.⁴ The Government of Kenya has already indicated that if it is sent a cooperation request by the Registry, it is ready to attempt to locate the witnesses and ascertain if any of them are now willing to testify voluntarily.⁵
4. On 6 June 2014, the Appeals Chamber ordered that Mr. Sang and the Prosecutor may respond to the Ruto Defence request for suspensive effect by 10 June 2014. By virtue of this filing, the Defence responds thereto.
5. The Defence is in full support of the Ruto Defence request for partial suspensive effect. Full implementation of the Impugned Decision would have irreversible consequences or at least consequences which "would be very difficult to correct and may be irreversible" or "could potentially defeat the purpose of the appeal".⁶ To avoid a situation where the Appeals Chamber, if it decides in favour of the Defence, is not in a position to rectify these consequences, suspensive effect should indeed be given.

¹ ICC-01/09-01/11-1274-Corr2, 17 April 2014.

² ICC-01/09-01/11-1313, para 40.

³ ICC-01/09-01/11-1344; ICC-01/09-01/11-1345.

⁴ ICC-01/09-01/11-1345, paras 50-53.

⁵ ICC-01/09-01/11-1304, para 7.

⁶ ICC-01/09-01/11-862 (OA 5), para. 6 citing to ICC-01/04-01/07-3344 (OA 13), para. 6.

II. SUBMISSIONS

6. The witnesses who are subject to the Prosecutor's Witness Summons have all been made to believe that their cooperation with the Prosecution was voluntary.⁷ In its 'Protocol on the practices to be used to familiarise witnesses for giving testimony', applicable in both the Kenya I and II cases, the Victims and Witnesses Unit ("VWU") states that it "will only be able to arrange the witness' availability for testimony as long as the individual consents to appear as a witness".⁸ The Defence submits that the implementation of the Impugned decision could have a significant impact on the witnesses' psychological well-being, as in accordance with the Impugned Decision, the witnesses would have to be threatened with sanctions if they continue to refuse to testify. This is unfair to the witnesses, whose cooperation has been secured on the basis of a genuine and objectively justified belief that their involvement was of a voluntary nature. They may have refused to cooperate from the outset had they been privy to the possibility that voluntary cooperation would, at a later stage, lead to compelled and coerced cooperation. Accordingly, any attempt to implement the Impugned Decision at this point would be contrary to the obligation upon the Court to protect witnesses. Pursuant to Article 68(1) of the Rome Statute, the Court is responsible for the protection of the psychological well-being of witnesses. In this instance, psychological damage could result as a matter of being exposed to stress and anxiety from the mere threat of deprivation of liberty. Further psychological damage would likely be compounded by actual deprivation of liberty. In both cases this damage is irreversible and avoidable.

7. In addition, pursuant to Article 68(1) the Court has a responsibility to protect its witnesses and to ensure that their safety and security are not jeopardised as a result of their testimony. Accordingly, as was pointed out by the dissenting Judge,⁹ before compelling any witness to testify, an assessment must be made as to whether or not their security can be adequately safeguarded. The witnesses in question have made allegations of threats to their security. While it is the position of the Defence that these allegations should not be accepted on face value, they can also not simply be ignored, in particular because the VWU cannot give any assurances as to their protection. Any issues relating to the witnesses' security cannot be remedied at a later stage. Even if

⁷ ICC-01/09-01/11-1274-Anx, paras. 15, 25.

⁸ ICC-01/09-01/11-704-Anx, para. 10.

⁹ ICC-01/09-01/11-1274-Anx, para. 25.

nothing happens to their safety and security, the fear thereof could seriously affect their psychological well-being.

8. The implementation of the decision would also have significant financial implications both for Kenya and for the Court. The process of localising the witnesses and determining and imposing an appropriate penalty should they still be unwilling to testify, will be time-consuming and involve considerable expense. It would be an utter waste of the Court's time and resources should the witnesses appear under compulsion and provide testimony that might subsequently be excluded as evidence. The Defence will also be burdened with a significant workload in preparing for these witnesses, which becomes a useless exercise if the Appeals Chamber overturns the Impugned Decision and the evidence is ultimately excluded.
9. Despite training, objectivity and professionalism, listening to incriminating evidence for weeks may have an impact on the minds of the judges. This remains an issue even if such evidence is excluded at a later stage, as it has been found that, despite being legally trained, judges are prone to be influenced by considerations not based on the evidence eventually admitted.¹⁰ Even if the judges are completely capable of consciously disregarding the evidence from their minds, there will always be a question mark about their ultimate findings and the effect of having these witnesses testify, especially if the Chamber reaches a conviction or rejects half time submissions. Indeed, it is impossible to determine the internal evaluative process of judges and which motives led to their decision.¹¹ Accordingly, the Defence requests the Court to make real efforts to avoid a possible miscarriage of justice through suspending the hearing of evidence until and unless the Appeals Chamber confirms the legality of compelling witnesses to testify.
10. Finally, even if the Appeals Chamber overturns the Impugned Decision, the exclusion of the evidence is not automatic. Pursuant to Article 69(7), it would have to be demonstrated that admission of the evidence "obtained by means of a violation of this Statute or internationally recognised human rights" "would be antithetical to and

¹⁰ See J. Frank, *Courts on Trial, Myth and Reality in American Justice* (Princeton University Press, 1973), pg 151-152.

¹¹ Unlike a witness, a judge is not subjected to cross-examination. How, then, can one "investigate his secret thoughts ...? He is the master of them, and what he says must be conclusive, as there is nothing to contradict or explain it." *Duke of Buccleuch v. Metropolitan Board*, L.R. 5 H.L. 418, 434 (1872). See also Frank, *Courts on Trial*, *ibid*, pg 151-152, 157-159, 167-168; M. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U Penn L Rev 506 (1972-73), pg 540, ft note 77.

would seriously damage the integrity of the proceedings” (Article 69(7)(b)). Alternatively, the violation must cast “substantial doubt on the reliability of the evidence” (Article 69(7)(a)). The mere risk that the evidence would be admitted, despite an Appeals Chamber’s ruling that the witnesses should not have been summoned, has serious implications for the fairness of the proceedings, vis-à-vis the accused and the summoned witnesses alike.

III. RELIEF REQUESTED

11. In light of the above considerations, the Defence requests that the Appeals Chamber grants the Ruto Defence request for partial suspensive effect of the Summons Decision.

Respectfully submitted,



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 10th day of June 2014
In Nairobi, Kenya