

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **26 June 2014**

THE 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

Prosecution response to Mr. Ruto's application under Regulation 28(2) for leave to address "specific issues" arising from the appeals against the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation"

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Introduction

1. The request by the Defence for Mr. Ruto (“the Ruto Defence”) for the Appeals Chamber to exercise its power under Regulation 28(2) of the Regulations of the Court to “order the participants to address specific issues in their written [...] submissions” should be dismissed.¹ Since nothing in the Prosecution’s written submissions requires the Appeals Chamber to order the further submissions requested, the Motion is merely an effort to circumvent the general restriction on the filing of replies in support of an interlocutory appeal. This should not be allowed.

Submissions

2. The Ruto Defence properly concedes the general rule that, for interlocutory appeals, “the appellant may not seek leave to reply to a response to the document in support of the appeal.”² Accordingly, although the Appeals Chamber may at its discretion request further submissions under Regulation 28, it does so to clarify an ambiguity or new understanding of the issues on appeal, when it is necessary to ensure “the principle of equality of arms”, on the one hand, and “the need for expeditious proceedings” on the other.³ Yet neither of these interests is served by further submissions from the Ruto Defence on either of the two issues they propose.⁴ Neither issue is “new” or “distinct” or “could not reasonably have been anticipated by the Defence”.⁵ Equality of arms in these proceedings has already been ensured by both Parties having had the equal right to file submissions under Regulation 65,⁶ and does not require further action under Regulation 28.

¹ ICC-01/09-01/11-1404 (“Motion”), para.1.

² Motion, para.3. *See further* ICC-01/05-01/08-1846 OA9, para.6; ICC-01/09-02/11-206 OA, para.8; ICC-01/09-01/11-239 OA, para.8; ICC-01/04-01/07-148 OA, para.3; ICC-01/04-01/06-424 OA3, para.5.

³ *See e.g.* ICC-01/09-01/11-239 OA, para.9; ICC-01/09-02/11-206 OA, para.9.

⁴ *Contra* Motion, paras.4-5, 8.

⁵ *Contra* Motion, para.5.

⁶ *See* ICC-01/04-01/06-424 OA3, Separate Opinion of Judge Pikis, para.7.

3. The Ruto Defence's disagreement with the Prosecution concerning the basic interpretation of the Decision⁷ is an obvious issue in these proceedings, and a matter which they could—and did—address in their document in support of the appeal.⁸ Further submissions on this issue provide no “new or additional information or arguments” which would assist the Appeals Chamber.⁹ To the contrary, the Ruto Defence's express desire to “demonstrate” the Prosecution's alleged “failure to properly and fairly deal with many of the Defence's criticisms of the Decision” underlines its intention to respond substantively to existing arguments. The Ruto Defence's requested submissions are no more than a reply in a different guise.¹⁰

4. Likewise, since the Decision was appealed on the basis that it was wrong in law, it was relevant and foreseeable for the Prosecution to maintain that the outcome of the Decision was legally correct¹¹—not only for the reasons given in the Decision, but also on an additional basis (Article 93(1)(b) of the Statute) argued before the Trial Chamber.¹² Although the Ruto Defence did not pre-empt that particular argument in these appellate proceedings¹³—even though they and the other Parties and participants had addressed Article 93(1)(b) at trial¹⁴—they nonetheless specifically relied upon Article 93(1)(b) as supporting their core argument on appeal.¹⁵ The

⁷ ICC-01/09-01/11-1274-Corr2 (“Decision”).

⁸ See e.g. ICC-01/09-01/11-1345 (“Mr. Ruto's Appeal”), paras.1, 6-7, 13, 15-18, 35, 37 (addressing matters related to the Court's ability itself to directly compel witness appearance, and to seek the cooperation of State Parties to compel witness appearance). At the request of the Ruto Defence, the Appeals Chamber had previously also granted an extension to the applicable page limit in order to ensure that it could make comprehensive and appropriate submissions supporting its appeal: ICC-01/09-01/11-1335 OA7 OA8, para.5.

⁹ See ICC-01/09-78 OA, para.9. See also ICC-01/09-01/11-239 OA, para.10 (“mere disagreement with the Prosecutor's arguments” is not a valid basis for seeking submissions under Regulation 28).

¹⁰ See Motion, para.6.

¹¹ Much less was the Prosecution response improper: *contra* Motion, para.7.

¹² *Contra* Motion, para.7. See fn.15 (noting the Prosecution's acknowledgement in its Response that its argument “was raised by the Prosecution before the Trial Chamber”).

¹³ See ICC-01/04-01/06-424 OA3, Separate Opinion of Judge Pikis, para.1 (“Every argument relating to the subject-matter of the appeal as defined by the grounds of appeal is from the outset a relevant and foreseeable matter that may be made a subject of the address. Failure on the part of the appellant to deal with it in the document in support of the appeal does not dissociate it from the appeal nor does it qualify it as a new subject.”).

¹⁴ See ICC-01/09-01/11-1136-Red2, paras.3, 11-13; ICC-01/09-01/11-T-86-Red-ENG, pp.23, 31-32. See further ICC-01/09-01/11-1202, paras.22-25; ICC-01/09-01/11-T-86-Red-ENG, pp.6-7, 100-107, 111-113; ICC-01/09-01/11-T-87-ENG, pp.6-7, 29. See also *above* fn.12.

¹⁵ See Mr. Ruto's Appeal, paras.10, 18, 31.

Prosecution was therefore fully entitled to respond by stating its view of Article 93(1)(b), and to explain its reasons for doing so.

Conclusion

5. The Motion should be dismissed. The submissions contained in the Motion itself—which go to the merits of these appeals¹⁶—should, moreover, be disregarded by the Appeals Chamber.



Fatou Bensouda, Prosecutor

Dated this 26th day of June 2014

At The Hague, The Netherlands

¹⁶ See e.g. Motion, paras.5-6 (submitting *inter alia* that “the Prosecution not only seeks to distance itself from a large part of the Decision’s reasoning but also misstates the Trial Chamber’s findings”, that “the Trial Chamber did find that the Court itself may compel the personal appearance of witnesses”, and that the “enforceable summons’ [...] has no basis in the Decision”).