

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **27 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. Sang'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"**

**Source: Office of the Prosecutor**

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**REGISTRY**

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**Registrar**

Mr. Herman von Hebel

## Introduction

1. Subsequent to the application under Regulation 28(2) made by the Defence for Mr. Ruto (“the Ruto Defence”),<sup>1</sup> and to the response filed by the Prosecution,<sup>2</sup> the Defence for Mr. Sang (“the Sang Defence”) filed a similar but separately reasoned application.<sup>3</sup> Given this timing, and the manner in which Mr. Sang’s Motion is reasoned, the Prosecution is obliged to file a further substantive response to the Sang Defence.<sup>4</sup> Yet the Prosecution opposes Mr. Sang’s Motion for the same reasons it opposed Mr. Ruto’s Motion—nothing warrants an intervention under Regulation 28, and therefore the Appeals Chamber should not permit the Sang Defence or the Ruto Defence to circumvent the general restriction on the filing of replies in support of an interlocutory appeal.

## Submissions

2. Although the Sang Defence, like the Ruto Defence,<sup>5</sup> first appears to acknowledge the general and well-established rule that replies may not be filed in support of an interlocutory appeal,<sup>6</sup> the Sang Defence then illogically concludes that “there is established jurisprudence that an appellant can, with an order of the Appeals Chamber, file a reply in an interlocutory appeal.”<sup>7</sup> This erroneous conclusion<sup>8</sup> is based on a misapprehension of Regulation 28, which provides for the Appeals Chamber to order additional submissions—when necessary<sup>9</sup>—on “specific issues”, a distinct and much more focused procedure than a reply. Equality of arms in these proceedings has already been ensured by the equal right of all Parties to file

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<sup>1</sup> ICC-01/09-01/11-1404 OA7 OA8 (“Mr. Ruto’s Motion”).

<sup>2</sup> ICC-01/09-01/11-1408 OA7 OA8 (“Prosecution Response to Mr. Ruto’s Motion”).

<sup>3</sup> ICC-01/09-01/11-1409 OA7 OA8 (“Mr. Sang’s Motion”).

<sup>4</sup> If it became habitual, the Prosecution would question the judicial economy of any practice by which a second, substantially similar Defence motion is filed after the Prosecution has responded to the first, and in which the second motion directly addresses arguments made by the Prosecution in its response (*see* Mr. Sang’s Motion, fn.8), effectively providing a reply for the first motion.

<sup>5</sup> *See* Mr. Ruto’s Motion, para.3. *See also* Prosecution Response to Mr. Ruto’s Motion, para.2.

<sup>6</sup> Mr. Sang’s Motion, para.3.

<sup>7</sup> *See* Mr. Sang’s Motion, para.5.

<sup>8</sup> *See* Prosecution Response to Mr. Ruto’s Motion, para.2, fn.2.

<sup>9</sup> *See e.g.* ICC-01/09-01/11-239 OA, para.9; ICC-01/09-02/11-206 OA, para.9. *See also* Prosecution Response to Mr. Ruto’s Motion, para.2.

submissions under Regulation 65.<sup>10</sup> It does not require the Appeals Chamber to seek submissions from the Sang Defence under Regulation 28 on any of the three issues they propose.<sup>11</sup>

3. As the Prosecution has already explained with respect to Mr. Ruto's Motion:<sup>12</sup>

- The disagreement between the Defence and the Prosecution concerning the basic interpretation of the Decision<sup>13</sup> is an obvious issue in these proceedings, and a matter which the Sang Defence could—and, like the Ruto Defence,<sup>14</sup> did—address in their document in support of the appeal.<sup>15</sup> Further submissions on this issue provide no “new or additional information or arguments” which would assist the Appeals Chamber.<sup>16</sup>
- The Decision was appealed on the basis that it was wrong in law, and therefore it was relevant and foreseeable for the Prosecution to maintain that the outcome of the Decision was legally correct<sup>17</sup>—not only for the reasons given in the Decision, but also on the basis of Article 93(1)(b) of the Statute. The failure of the Sang Defence to address this argument expressly in their appeal does not “dissociate it from the appeal nor [...] qualify it as a new

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<sup>10</sup> See ICC-01/04-01/06-424 OA3, Separate Opinion of Judge Pikis, para.7. The Appeals Chamber had, moreover, previously granted an extension to the applicable page limit to ensure that the Defence could make comprehensive and appropriate submissions supporting their appeals: ICC-01/09-01/11-1335 OA7 OA8, para.5. The Sang Defence's complaint that the extension was not large enough (Mr. Sang's Motion, para.8) is undermined by the fact that they failed to comply with the terms of that extension anyway: see ICC-01/09-01/11-1380, paras.77-79; ICC-01/09-01/11-1344-Corr+Corr-Anx OA7 (subsequently seeking to re-file an abridged version of the document in support of Mr. Sang's appeal).

<sup>11</sup> *Contra* Mr. Sang's Motion, paras.4, 8-9, 11, 13.

<sup>12</sup> See Prosecution Response to Mr. Ruto's Motion, paras.3-4.

<sup>13</sup> ICC-01/09-01/11-1274-Corr2 (“Decision”). See Mr. Sang's Motion, para.11.

<sup>14</sup> See e.g. ICC-01/09-01/11-1345 OA8 (“Mr. Ruto's Appeal”), paras.1, 6-7, 13, 15-18, 35, 37.

<sup>15</sup> See e.g. ICC-01/09-01/11-1344 OA7 (“Mr. Sang's Appeal”), paras.7-11, 14-17, 35-38, 42, 45 (addressing matters relating to the Court's ability itself to directly compel witness appearance, and to seek the cooperation of State Parties to compel witness appearance).

<sup>16</sup> 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).

<sup>17</sup> *Contra* Mr. Sang's Motion, paras.9-10.

subject.”<sup>18</sup> The relevance of Article 93(1)(b) to the appeal was apparent not only from the submissions made before the Trial Chamber<sup>19</sup> but also from the Ruto Defence’s reliance upon it in support of their appellate argument.<sup>20</sup>

4. It was equally relevant and foreseeable for the Prosecution to address the interpretation of Article 93(1)(e) of the Statute.<sup>21</sup> The Decision addresses Defence arguments concerning the meaning of Article 93(1)(e)—and the intention of the Statute’s drafters—extensively.<sup>22</sup> The Sang Defence, like the Ruto Defence, maintains many of these arguments on appeal.<sup>23</sup> Likewise, the Prosecution’s position as to the proper interpretation of Article 93(1)(e) is wholly consistent with its position at trial.<sup>24</sup>

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<sup>18</sup> ICC-01/04-01/06-424 OA3, Separate Opinion of Judge Pikis, para.1

<sup>19</sup> See ICC-01/09-01/11-1202, paras.22-25; ICC-01/09-01/11-T-86-Red-ENG, pp.6-7, 23, 31-32, 100-107, 111-113; ICC-01/09-01/11-T-87-ENG, pp.6-7, 29.

<sup>20</sup> See Mr. Ruto’s Appeal, paras.10, 18, 31.

<sup>21</sup> *Contra* Mr. Sang’s Motion, paras.9-10.

<sup>22</sup> See *e.g.* Decision, paras.23, 29, 33-35, 114-119, 146-154.

<sup>23</sup> See *e.g.* Mr. Sang’s Appeal, paras.8, 17-18, 21, 26-29, 35; Mr. Ruto’s Appeal, paras.7-9, 12, 16-20, 29-31.

<sup>24</sup> See *e.g.* ICC-01/09-01/11-1120-Red2, paras.76-79; ICC-01/09-01/11-1183-Red, para.20; ICC-01/09-01/11-T-86-Red-ENG, pp.10-13; ICC-01/09-01/11-1202, paras.12, 19. See also ICC-01/09-01/11-T-86-Red-ENG, pp.26-28.

### Conclusion

5. Mr. Sang's Motion, like Mr. Ruto's Motion, should be dismissed. The submissions contained in Mr. Sang's Motion itself—which go to the merits of these appeals<sup>25</sup>—should, moreover, be disregarded by the Appeals Chamber.



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Fatou Bensouda, Prosecutor

Dated this 27<sup>th</sup> day of June 2014

At The Hague, The Netherlands

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<sup>25</sup> See e.g. Mr. Sang's Motion, paras.7-8, 11-12, (submitting *inter alia* that “the Prosecution disregards large parts of, and removes itself from, the principal reasoning underpinning the Majority's Decision”, “the Prosecution's Response mischaracterises both the Majority's Decision and the Defence's submissions”, “[t]he Majority did not in fact limit the Court's power to compel witness testimony to ‘enforceable summonses through State Party cooperation’”, and “the Defence arguments are not misdirected”).