

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/09-01/11 OA 7 OA 8

Date: 4 July 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 document

**Decision on Mr William Samoei Ruto's and Mr Joshua Arap Sang's applications
for leave to make further submissions and on Mr Joshua Arap Sang's
corrigendum of 26 June 2014**



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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Mr William Samoei Ruto
Mr Karim A. A. Khan
Mr David Hooper

Counsel for Mr Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

REGISTRY

Registrar
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) entitled “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation” of 17 April 2014 (ICC-01/09-01/11-1274-Corr2),

Having before it the “Defence application for leave to address specific issues raised in the ‘Prosecution consolidated response to Mr. Ruto and Mr. Sang’s appeals against the “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”” of 25 June 2014 (ICC-01/09-01/11-1404); the “Sang Defence Request for an order by the Appeals Chamber to permit the appellant to address specific issues raised in the ‘Consolidated response to Mr. Ruto and Mr Sang’s appeals against the “Decision on the Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”” of 26 June 2014 (ICC-01/09-01/11-1409); and the “Corrigendum to Sang Defence Appeal against the ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”” of 26 June 2014 (ICC-01/09-01/11-1344-Corr),

Renders the following

DECISION

1. The above-mentioned requests to make further submissions are rejected, and
2. Should the Prosecutor wish to do so, she may file, by 16h00 on Friday, 11 July 2014, a revised version of the “Prosecution consolidated response to Mr. Ruto and Mr. Sang’s appeals against the ‘Decision on the Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation””, with the view to adjusting any references to the paragraph and footnote numbers of the “Corrigendum to Sang Defence appeal against the ‘Decision on Prosecutor’s



Application for Witness Summonses and resulting Request for State Party Cooperation”.

REASONS

I. BACKGROUND

1. On 17 April 2014, Trial Chamber V (A) (hereinafter: “Trial Chamber”) rendered, by majority, Judge Herrera Carbuccion dissenting,¹ the “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”² (hereinafter: “Impugned Decision”).

2. On 23 May 2014, the Trial Chamber rendered the “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”³ (hereinafter: “Decision Granting Leave to Appeal”), in which it granted Mr William Samoei Ruto (hereinafter: “Mr Ruto”) and Mr Joshua Arap Sang (hereinafter: “Mr Sang”) leave to appeal the Impugned Decision. The Trial Chamber formulated the appealable issues as follows:

- 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’).⁴

3. On 3 June 2014, the Appeals Chamber rendered the “Decision on requests of Mr William Samoei Ruto and Mr Joshua Arap Sang for extension of page limit for their documents in support of the appeal”⁵ (hereinafter: “Decision Granting a Page Limit Extension”), extending by five pages each the page limits for the respective documents in support of the appeals of Mr Ruto and Mr Sang.

¹ ICC-01/09-01/11-1274-Anx.

² ICC-01/09-01/11-1274-Corr2.

³ ICC-01/09-01/11-1313.

⁴ Decision Granting Leave to Appeal, para. 40.

⁵ ICC-01/09-01/11-1335 (OA 7 OA 8).

4. On 5 June 2014, Mr Sang filed the “Sang Defence appeal against the *Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation*”⁶ (hereinafter: “Mr Sang’s Document in Support of his Appeal”).

5. On the same day, Mr. Ruto filed the “Defence appeal against ‘Decision on the Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’”⁷ (hereinafter: “Mr Ruto’s Document in Support of his Appeal”).

6. On 20 June 2014, the Prosecutor filed the “Prosecution consolidated response to Mr. Ruto and Mr. Sang’s appeals against the ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’”⁸ (hereinafter: “Prosecutor’s Consolidated Response”).

7. On 25 June 2014, Mr Ruto filed the “Defence application for leave to address specific issues raised in the ‘Prosecution consolidated response to Mr. Ruto and Mr. Sang’s appeals against the ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’”⁹ (hereinafter: “Mr Ruto’s Request”). Mr Ruto submits that, in the Prosecutor’s Consolidated Response, the Prosecutor (i) misstated the Impugned Decision in relation to the Court’s powers to compel the personal appearance of witnesses,¹⁰ and (ii) relied on a statutory provision (namely article 93 (1) (b) of the Statute), which finds no basis in the Impugned Decision.¹¹ In his view, the Prosecutor thereby raised issues that are new, distinct and could not have been anticipated by him, which, as a matter of fairness, should justify his request to make further submissions on these specific issues pursuant to regulation 28 of the Regulations of the Court.¹²

8. On 26 June 2014, the Prosecutor filed the “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’”,¹³ (hereinafter: “Prosecutor’s

⁶ ICC-01/09-01/11-1344 (OA 7).

⁷ ICC-01/09-01/11-1345 (OA 8).

⁸ ICC-01/09-01/11-1380 (OA 7 OA 8).

⁹ ICC-01/09-01/11-1404 (OA 7 OA 8).

¹⁰ Mr Ruto’s Request, para. 6.

¹¹ Mr Ruto’s Request, para. 7.

¹² Mr Ruto’s Request, paras 5, 7-8.

¹³ ICC-01/09-01/11-1408 (OA 7 OA 8).

Response to Mr Ruto's Request"), submitting that Mr Ruto's Request should be dismissed.¹⁴ As to Mr Ruto's first argument, the Prosecutor submits that the disagreement between the parties concerning the interpretation of the Impugned Decision is actually one of the issues on appeal, and it was addressed in Mr Ruto's Document in Support of his Appeal.¹⁵ As to Mr Ruto's second argument, the Prosecutor underlines that, the alleged error at hand being a legal error, in her view, the outcome of the Impugned Decision was legally correct, "not only for the reasons given in the [Impugned] Decision, but also on an additional basis (article 93(1)(b) of the Statute)".¹⁶ She adds that since all parties addressed that provision at trial,¹⁷ and since they "specifically relied upon [a]rticle 93(1)(b) as supporting their core argument on appeal",¹⁸ she was entitled to state her view on article 93 (1) (b).¹⁹

9. On 26 June 2014, Mr Sang filed the "Sang Defence Request for an order by the Appeals Chamber to permit the appellant to address specific issues raised in the 'Consolidated response to Mr. Ruto and Mr Sang's appeals against the "Decision on the Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation"'"²⁰ (hereinafter: "Mr Sang's Request"), submitting two similar arguments to those in Mr Ruto's Request.²¹ He furthermore argues that the Prosecutor's submission that article 93 (1) (e) of the Statute "is limited to voluntary travel, rather than appearance, of witnesses" is also going beyond the scope of the

¹⁴ Prosecutor's Response to Mr Ruto's Request, para. 5.

¹⁵ Prosecutor's Response to Mr Ruto's Request, para. 3, referring to Mr Ruto's Document in Support of his Appeal, paras 1, 6-7, 13, 15-18, 35, 37.

¹⁶ Prosecutor's Response to Mr Ruto's Request, para. 4.

¹⁷ Prosecutor's Response to Mr Ruto's Request, para. 4, referring to "Defence response to the corrected and amended version of 'Prosecution's request under article 64(6)(b) and article 93 to summon witnesses'", 8 January 2014, ICC-01/09-01/11-1136-Red2, paras 3, 11-13; Transcript of 14 February 2014, ICC-01/09-01/11-T-86-Red-ENG, pp. 6-7, 23, 31-32, 100-107, 111-113; "Prosecution's further submissions pursuant to the Prosecution's request under article 64(6)(b) and article 93 to summon witnesses", dated 4 March 2014, and registered 5 March 2014, ICC-01/09-01/11-1202, paras 22-25 (the document was originally filed as confidential, ICC-01/09-01/11-1202-Conf, and reclassified as public, ICC-01/09-01/11-1202, pursuant to the Trial Chamber's instructions of 13 March 2014); Transcript of 17 February 2014, ICC-01/09-01/11-T-87-ENG, pp. 6-7, 29.

¹⁸ Prosecutor's Response to Mr Ruto's Request, para. 4, referring to Mr Ruto's Document in Support of his Appeal, paras 10, 18, 31.

¹⁹ Prosecutor's Response to Mr Ruto's Request, para. 4.

²⁰ ICC-01/09-01/11-1409 (OA 7 OA 8).

²¹ Mr Sang's Request, paras 7, 11-12 (as to the alleged misinterpretation of the Impugned Decision), and paras 9-10 (as to the reliance upon article 93 (1) (b) of the Statute as an alternative basis on which to uphold the correctness of the Impugned Decision).

appeal.²² In Mr Sang's view, by making this argument, the Prosecutor violated the principle of equality of arms between the parties.²³

10. On the same day, Mr Sang also filed the "Corrigendum to Sang Defence appeal against the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'"²⁴ (hereinafter: "Corrigendum to Mr Sang's Document in Support of his Appeal"). Mr Sang submits that he filed this corrigendum because, as pointed out in the Prosecutor's Consolidated Response,²⁵ he exceeded the average word limit of 300 words per page stipulated by regulation 36 (3) of the Regulations of the Court.

11. On 27 June 2014, the Prosecutor filed the "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'"²⁶ (hereinafter: "Prosecutor's Response to Mr Sang's Request"), submitting that Mr Sang's Request should be dismissed and that Mr Sang's arguments, "which go to the merits of these appeals-should, moreover, be disregarded by the Appeals Chamber".²⁷ The Prosecutor states that, Mr Sang's Request being similar to Mr Ruto's Request, she opposes it for the same reasons.²⁸ She repeats that the disagreement between the parties concerning the interpretation of the Impugned Decision is actually one of the issues on appeal, and notes that it was also addressed in Mr Sang's Document in Support of his Appeal.²⁹ She further reiterated her submissions that the relevance of article 93 (1) (b) of the Statute to the issues on appeal was obvious from the proceedings before the Trial Chamber, as well as from the reliance thereon by Mr Ruto.³⁰ In the Prosecutor's view,

²² Mr Sang's Request, paras 9-10.

²³ Mr Sang's Request, para. 8.

²⁴ ICC-01/09-01/-11-1344-Corr (OA 7), with an explanatory note in annex, ICC-01/09-01/1344-Corr-Anx (OA 7) (hereinafter: "Annex to the Corrigendum. to Mr Sang's Document in Support of his Appeal").

²⁵ Annex to the Corrigendum to Mr Sang's Document in Support of his Appeal, para. 2, referring to the Prosecutor's Consolidated Response, paras 77, 78.

²⁶ ICC-01/09-01/11-1410 (OA 7 OA 8).

²⁷ Prosecutor's Response to Mr Sang's Request, para. 5, referring to Mr Sang's Request, paras 7-8, 11-12.

²⁸ Prosecutor's Response to Mr Sang's Request, paras 1, 4.

²⁹ Prosecutor's Response to Mr Sang's Request, para. 3, referring to Mr Sang's Document in Support of his Appeal, paras 7-11, 14-17, 35-38, 42, 45.

³⁰ Prosecutor's Response to Mr Sang's Request, para. 3, similarly referring to "Defence response to the corrected and amended version of 'Prosecution's request under article 64(6)(b) and article 93 to summon witnesses'", 8 January 2014, ICC-01/09-01/11-1136-Red2, paras 3, 11-13; Transcript of 14

it was also foreseeable that she would address article 93 (1) (e) of the Statute, in light of the arguments presented by all parties before the Trial Chamber in that regard, and the interpretation given in the Impugned Decision thereto.³¹

II. MERITS

12. The Appeals Chamber recalls its previous jurisprudence, which establishes that

[T]he Regulations of the Court “do not foresee replies to responses to documents in support of the appeal for appeals under rules 154 and 155”. Nevertheless, the Appeals Chamber has also held that, “should the arguments that are raised in a response to a document in support of the appeal make further submissions by the appellant necessary for the proper disposal of the appeal, the Appeals Chamber will issue an order to that effect pursuant to regulation 28 (2) of the Regulations of the Court, bearing in mind the principle of equality of arms and the need for expeditious proceedings”. Therefore, the question before the Appeals Chamber is whether [the participant making the request] should be allowed to file additional submissions pursuant to regulation 28 of the Regulations of the Court.³² [Footnotes omitted.]

13. Recalling the discretionary nature of its power under regulation 28 of the Regulations of the Court, and having carefully considered both requests, the Appeals Chamber finds that, in the present case, further submissions are not necessary for the proper disposal of the appeals at hand. The Appeals Chamber notes that the interpretation of the Impugned Decision as to the Court’s ability to directly compel witnesses to appear before it and to seek the cooperation of State Parties in that regard falls within the ambit of the issues on appeal. Furthermore, it was foreseeable that arguments concerning article 93 (1) (b) of the Statute would be made before the Appeals Chamber, considering that this provision was relied upon and addressed both

February 2014, ICC-01/09-01/11-T-86-Red-ENG, pp. 6-7, 23, 31-32, 100-107, 111-113; “Prosecution’s further submissions pursuant to the Prosecution’s request under article 64(6)(b) and article 93 to summon witnesses”, dated 4 March 2014, and registered 5 March 2014, ICC-01/09-01/11-1202, paras 22-25; Transcript of 17 February 2014, ICC-01/09-01/11-T-87-ENG, pp. 6-7, 29; and to Mr Ruto’s Document in Support of his Appeal, paras 10, 18, 31.

³¹ Prosecutor’s Response to Mr Sang’s Request, para. 4, referring to the Impugned Decision, paras 23, 29, 33-35, 114-119, 146-154; Mr Sang’s Document in Support of his Appeal, paras 8, 17-18, 21, 26-29, 35; Mr Ruto’s Document in Support of his Appeal, paras 7-9, 12, 16-20, 29-31; “Prosecution’s request under article 64(6)(b) and article 93 to summon witnesses”, 29 November 2013, ICC-01/09-01/11-1120-Red2.

³² *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the Libyan Government’s request to file further submissions”, 12 September 2013, ICC-01/11-01/11-442 (OA 4), para. 12, citing *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Prosecutor’s ‘Application for leave to Reply to ‘Conclusions de la défense en réponse au mémoire d’appel du Procureur’””, 12 September 2006, ICC-01/04-01/06-424 (OA 3), paras 6, 7.

during trial and appeal proceedings.³³ Finally, the Appeals Chamber recalls that it granted an extension to the applicable page limit to both Mr Ruto and Mr Sang for their respective documents in support of their appeals, thereby allowing them to present all arguments within the scope of the appeals.³⁴

14. For these reasons, the Appeals Chamber rejects Mr Sang's Request and Mr Ruto's Request.

15. Furthermore, the Appeals Chamber notes that, on 26 June 2014, Mr Sang filed the Corrigendum to Mr Sang's Document in Support of his Appeal. This document was filed because, as was pointed out by the Prosecutor, Mr Sang's Document in Support of his Appeal did not comply with regulation 36 (3) of the Regulations of the Court in respect of the average number of words per page. In order to comply with this word limit, in his corrigendum, Mr Sang deleted certain paragraphs or parts thereof, as well as footnotes.³⁵

16. The Appeals Chamber is deeply concerned by the fact that Mr Sang's Document in Support of his Appeal did not comply with regulation 36 (3) of the Regulations of the Court. This is even more so because the Appeals Chamber, in its Decision Granting a Page Limit Extension, specifically reminded the parties of the need to comply with the average number of words per page, as stipulated by that provision.³⁶ The Appeals Chamber recalls that under regulation 29 of the Regulations of the Court, "[i]n the event of non-compliance by a participant with the provisions of any regulation [...] the Chamber may issue any order that is deemed NECESSARY in the interests of justice". In the present circumstances, the Appeals Chamber seriously considered rejecting both Mr Sang's Document in Support of his Appeal and the

³³ See "Defence response to the corrected and amended version of 'Prosecution's request under article 64(6)(b) and article 93 to summon witnesses'", 8 January 2014, ICC-01/09-01/11-1136-Red2, paras 3, 11-13; Transcript of 14 February 2014, ICC-01/09-01/11-T-86-Red-ENG, pp. 6-7, 23, 31-32, 100-107, 111-113; "Prosecution's further submissions pursuant to the Prosecution's request under article 64(6)(b) and article 93 to summon witnesses", dated 4 March 2014, and registered 5 March 2014, ICC-01/09-01/11-1202, paras 22-25; Transcript of 17 February 2014, ICC-01/09-01/11-T-87-ENG, pp. 6-7, 29; and to Mr Ruto's Document in Support of his Appeal, paras 10, 18, 31.

³⁴ Decision Granting a Page Limit Extension, *see* para 5 in particular.

³⁵ See the Explanatory Note in the Annex to the Corrigendum to Mr Sang's Document in Support of his Appeal. However, at footnote 89 (now 72), Mr Sang added a reference to para. 65 of the Impugned Decision, instead of referring only to para. 91 thereof in his initial filing. Furthermore, the Appeals Chamber notes that deletions of parts of paras 40 and 42 of Mr Sang's Document in Support of his Appeal were not reported in the Annex to the Corrigendum to Mr Sang's Document in Support of his Appeal.

³⁶ Decision Granting a Page Limit Extension, para. 5.

Corrigendum to Mr Sang's Document in Support of his Appeal. Nevertheless, considering that the Impugned Decision is also under appeal by Mr Ruto, which means that proceedings before the Appeals Chamber continue in any event and more importantly that the Appeals Chamber's judgment will apply to both Mr Ruto and Mr Sang, it decides to accept the Corrigendum to Mr Sang's Document in Support of his Appeal on an exceptional basis.

17. In these circumstances, the Appeals Chamber considers it appropriate to give an opportunity to the Prosecutor to file a revised version of the Prosecutor's Consolidated Response, with a view to adjusting the paragraphs and footnotes references to the Corrigendum to Mr Sang's Document in Support of his Appeal, where required. In any case, for the sake of clarity, any further reference to Mr Sang's Document in Support of his Appeal should refer to the Corrigendum to Mr Sang's Document in Support of his Appeal.

Done in both English and French, the English version being authoritative.



Judge Erkki Kourula
On behalf of the Presiding Judge

Dated this 4th July 2014

At The Hague, The Netherlands