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

Date: 26 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 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’”

Source: Defence for Mr. Joshua arap Sang

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Defence for Mr. Joshua arap Sang (“Defence”) hereby requests the Appeals Chamber to exercise its power under Regulation 28(2) of the Regulations of the Court and order the Defence, as the appellant, to file submissions in reply to specific issues raised by the Office of the Prosecutor (“Prosecution”) in its *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”* (“Response”).¹
2. The Defence submits that the Response raises issues not previously addressed by the parties and that the Appeals Chamber would be materially assisted, and the proper disposition of the appeal advanced, by additional submissions by the appellant. The Defence could not have anticipated these issues as they were not foreseeable. The Defence submits that such a reply could be made within 10 pages.

II. APPLICABLE LAW

3. In an interlocutory appeal under Rule 155, there is no equivalent right to that contained in Regulation 24(5) to apply for leave to reply.² However, the Appeals Chamber has held that in an appeal under Rules 154 or 155 it can permit a reply to be made by the appellant by way of order under Regulation 28(2).³ Regulation 28(2) provides:

A Chamber may order the participants to address specific issues in their written or oral submissions within a time limit specified by the Chamber.

4. The Appeals Chamber has held that such an order may be made “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”,⁴ when the Appeals Chamber would be “materially assisted” by further submissions,⁵ or when “further submissions are justified and necessary... in light of the arguments as a

¹ ICC-01/09-01/11-1380, 20 June 2014.

² *The Prosecutor v. Lubanga*, Decision on Prosecutor’s Application for Leave to Reply to Conclusions de la défense en réponse au mémoire d’appel du Procureur, ICC-01/04-01/06-424, 12 September 2006, paras 5-6.

³ Ibid; *The Prosecutor v. Bemba and others*, Decision on Mr Fidele Babala Wandu’s request for leave to reply to the Prosecution opposition to the Babala Defence’s appeal against his provisional detention, ICC-01/05-01/13 OA3-342, 15 April 2014, para 6.

⁴ ICC-01/04-01/06-424, para 7.

⁵ ICC-01/05-01/13 OA3-342, para 7.

whole that have been made on appeal.”⁶ The Appeals Chamber’s reliance on Regulation 28(2) in such circumstances also reflects the importance of the principle of “equality of arms”⁷ and thus enables it to rectify a disparity between the parties that has arisen as a result of submissions made in response to an appeal.

5. Accordingly, there is established jurisprudence that an appellant can, with an order of the Appeals Chamber, file a reply in an interlocutory appeal. The Defence is thus not acting “to circumvent the general restrictions on the filing of replies in support of an interlocutory appeal”, as the Prosecution submits.⁸
6. It is submitted that in determining whether additional submissions are necessary for the proper disposal of the appeal or offer material assistance, some guidance may also be found in the jurisprudence arising out of Regulation 24(5). Leave to reply has been granted under Regulation 24(5) when new and distinct issues of law or fact have been raised in the response and additional submissions are required because of the import and potential effect of the issues,⁹ the Chamber holds it would benefit from further submissions,¹⁰ or facts have been misrepresented in the response.¹¹

III. SUBMISSIONS

7. The Defence submits that the Prosecution’s Response goes beyond responding to the submissions made by the Defence and Defence for Mr. William Samoei Ruto in their respective appeal briefs,¹² and advances grounds not covered in the Impugned

⁶ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on Mr Al-Senussi's request to file further submissions and related issues, ICC-01/11-01/11 (OA 6), 6 February 2014, para 18.

⁷ *Ibid*, para 17, citing with approval *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.

⁸ 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”, ICC-01/09-01/11-1408, 26 June 2014, para 1.

⁹ *The Prosecutor v. Mbarushimana*, Decision on the Prosecution’s request for leave to reply to the Defence Response to Prosecution’s Request for the review of Potentially Privileged Material, ICC-01/04-01/10-61, 24 February 2011, pp 3-4.

¹⁰ *The Prosecutor v. Muthaura and Kenyatta*, Decision on Defence requests for leave to reply, ICC-01/09-02/11-679, 7 March 2013, para 9; *The Prosecutor v. Banda and Jerbo*, Redacted Order on the defence Application for Leave to Reply to the Prosecution’s Response to the Defence Request for a Temporary Stay of Proceedings and to the Defence Request for an Oral Hearing, ICC-02/05-03/09-294-Red, 16 February 2012, para 6.

¹¹ ICC-02/05-03/09-294-Red, para 6(iv).

¹² Sang Defence appeal against the Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1344, 5 June 2014; Defence appeal against the Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1345, 5 June 2014.

Decision itself.¹³ In fact, the Prosecution disregards large parts of, and removes itself from, the principal reasoning underpinning the Majority's Decision. The Defence submits that the appropriate course of action would have been for the Prosecution to file its own leave to appeal, had it wished to address differing issues arising out of the Impugned Decision. This is particularly so because the Trial Chamber was very specific in formulating the two issues for which leave to appeal was granted.

8. In departing from the Majority's Decision to the extent it did, the Prosecution deprived the Defence of an opportunity to address the matters raised in the Prosecution's Response. This undermines the equality of arms between the parties, which, as aforementioned, is an important consideration to be taken into account by the Appeals Chamber in determining whether or not to issue an order under Regulation 28(2).¹⁴ This is particularly true in light of the fact that the Defence was only given 25 pages to appeal the Decision, which only provides 22.5 pages (without the cover page, notification page and signature page) for the making of arguments.
9. The Defence submits the following issues fall within this category:
 - i. The Prosecution's reliance on Article 93(1)(b) "as an alternative basis on which to uphold the correctness of the [Impugned] Decision."¹⁵ The Prosecution submits that a summons could be served and enforced pursuant to Article 93(1)(b) because it permits the taking of evidence, including testimony under oath, in a domestic setting through State cooperation.¹⁶
 - ii. At paragraph 24 of its Response, the Prosecution submits that Article 93(1)(e) is limited to voluntary travel, rather than appearance, of witnesses.
10. Neither of these issues were discussed in detail, or at all, in the Majority's Decision. Accordingly, in the Defence submission, the Appeals Chamber would be materially assisted by additional Defence submissions on these issues, in particular because the Defence disagrees with the Prosecution's analysis thereon.

¹³ Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2, 17 April 2014.

¹⁴ *Supra* note 7.

¹⁵ ICC-01/09-01/11-1380, para 44.

¹⁶ *Ibis*, paras 44-48.

11. In addition, the Prosecution's Response mischaracterises both the Majority's Decision and the Defence's submissions in respect of the following issue:

(i) At paragraph 19 of its Response the Prosecution incorrectly states that "many Defence arguments are misdirected" because the Majority did not make a finding "that the Court itself may compel the personal appearance of witnesses who are not physically present on the Court's premises or in its custody by directly applying sanctions to them", but only grants the Court a power to require witness appearance by means of "enforceable summonses through State Party cooperation".

12. The Majority did not in fact limit the Court's power to compel witness testimony to "enforceable summonses through State Party cooperation".¹⁷ Moreover, the Defence arguments are not misdirected, because regardless of the mechanism used to enforce the summons, the Decision permits the compulsion of witness appearance for the purpose of hearing evidence which will ultimately be used by the Trial Chamber.

IV. RELIEF REQUESTED

13. For the aforementioned reasons, the Defence requests the Appeals Chamber to exercise its power under Regulation 28(2) and permit the Defence to respond to the three issues set out above.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 26th day of June 2014
In Nairobi, Kenya

¹⁷ ICC-01/09-01/11-1274-Corr2, paras. 87, 88.