

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

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

**Date: 17 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 document**

**Decision on Mr William Samoei Ruto's request for suspensive effect**

**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**

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**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 appeal against the ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’” of 5 June 2014 (ICC-01/09-01/11-1345), in which a request for suspensive effect is made,

*Renders the following*

## DECISION

The above-mentioned request for suspensive effect is rejected.

## REASONS

### I. PROCEDURAL HISTORY

1. On 23 May 2014, Trial Chamber V (A) (hereinafter: “Trial Chamber”) granted Mr William Samoei Ruto (hereinafter: “Mr Ruto”) and Mr Joshua Arap Sang (hereinafter: “Mr Sang”) leave to appeal<sup>1</sup> its “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”<sup>2</sup> of 17 April 2014 (hereinafter: “Impugned Decision”). With the Impugned Decision, the Trial Chamber *inter alia* decided to require the attendance of eight witnesses and to request the Government of Kenya (hereinafter: “Kenya”) “to facilitate, by way of compulsory measure as necessary, the appearance of the indicated witnesses for testimony before the Trial Chamber [...]”.<sup>3</sup>

<sup>1</sup> “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”, ICC-01/09-01/11-1313.

<sup>2</sup> ICC-01/09-01/11-1274-Corr2.

<sup>3</sup> Impugned Decision, p. 77.

2. On 5 June 2014, Mr Ruto and Mr Sang submitted their respective documents in support of the appeals.<sup>4</sup> In Mr Ruto's Document in Support of the Appeal, Mr Ruto makes a request for suspensive effect pursuant to article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence, to the extent that the Impugned Decision requests Kenya to compel the attendance of certain witnesses.<sup>5</sup> In support of this request and with reference to earlier decisions of the Appeals Chamber on suspensive effect, Mr Ruto submits that granting suspensive effect in the case at hand is required because fully implementing the Impugned Decision before the Appeals Chamber has ruled on these appeals would create a situation that could not be corrected, or could be corrected only with difficulties, and that would potentially defeat the purpose of the appeal.<sup>6</sup> In his view, this is because should the Appeals Chamber eventually reverse the Impugned Decision, without having granted suspensive effect, this would have negative consequences on the witnesses concerned.<sup>7</sup> Mr Ruto argues, in addition, that "no government should be required to act illegally and contrary to the Statute and, crucially, its own Constitution".<sup>8</sup> Mr Ruto further submits that unless suspensive effect is granted, the very purpose of the appeals at hand could be defeated as the witnesses may be compelled to testify before the Appeals Chamber renders its judgment in the present appeals.<sup>9</sup> Notwithstanding the request for suspensive effect, Mr Ruto submits that, pending determination of these appeals, the Prosecutor and the Registry should still liaise with Kenya in relation to the eight summonses, in order to safeguard his right to be tried without delay.<sup>10</sup>

3. On 10 June 2014, pursuant to an order issued by the Appeals Chamber,<sup>11</sup> Mr Sang and the Prosecutor filed their respective responses to Mr Ruto's request for suspensive effect.<sup>12</sup> Mr Sang fully supports the request made by Mr Ruto,<sup>13</sup> while the

<sup>4</sup> "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; and "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 (hereinafter: "Mr Ruto's Document in Support of the Appeal").

<sup>5</sup> Mr Ruto's Document in Support of the Appeal, paras 50-53.

<sup>6</sup> Mr Ruto's Document in Support of the Appeal, para. 50.

<sup>7</sup> Mr Ruto's Document in Support of the Appeal, para.51.

<sup>8</sup> Mr Ruto's Document in Support of the Appeal, para 51.

<sup>9</sup> Mr Ruto's Document in Support of the Appeal, paras 52.

<sup>10</sup> Mr Ruto's Document in Support of the Appeal, para.53, referring to ICC-01/09-01/11-1304, para. 8.

<sup>11</sup> "Order on the filing of a response to request for suspensive effect", 6 June 2014, ICC-01/09-01/11-1348.

<sup>12</sup> "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'",

Prosecutor submits that, the test for suspensive effect not being met, the request should be rejected.<sup>14</sup>

4. Mr Sang 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”.<sup>15</sup> In his view, this implementation would thus necessarily cause a breach of article 68 (1) of the Statute, which provides for the Court’s responsibility for the protection of the psychological well-being of witnesses.<sup>16</sup> He further agrees with the minority opinion to the Impugned Decision that, “before compelling any witness to testify, an assessment must be made as to whether or not their security can be adequately safeguarded”,<sup>17</sup> and stresses the Court’s responsibility to ensure witnesses’ safety and security.<sup>18</sup> Mr Sang also notes the significant financial implications of the implementation of the Impugned Decision for both the Court and Kenya, as well as the waste of time and resources for them and the defence teams.<sup>19</sup> Mr Sang submits that, even if the witnesses’ testimony were to be excluded at a later stage, the judges of the Trial Chamber might already have been influenced by it.<sup>20</sup> Finally, Mr Sang submits that the exclusion of their evidence would not be automatic.<sup>21</sup>

5. The Prosecutor submits that implementing the Impugned Decision pending the present appeals would neither result in an irreversible situation, nor lead to consequences that would be very difficult to correct, nor defeat the purpose of these appeals. In her view, this is because Mr Ruto’s submission that the implementation of the Impugned Decision prior to the delivery of the Appeals Chamber’s judgment in these appeals would cause damage to the concerned witnesses is speculative.<sup>22</sup> To her, the same applies to the submission that the witnesses will necessarily continue to

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ICC-01/09-01/11-1354 (hereinafter: “Mr Sang’s Response”); and “Prosecution Response to Mr Ruto’s Request for Suspensive Effect”, ICC-01/09-01/11-1355 (hereinafter: “Prosecutor’s Response”).

<sup>13</sup> Mr Sang’s Response, para. 11.

<sup>14</sup> Prosecutor’s Response, para. 9.

<sup>15</sup> Mr Sang’s Response, para. 6.

<sup>16</sup> Mr Sang’s Response, para. 6.

<sup>17</sup> Mr Sang’s Response, para. 7.

<sup>18</sup> Mr Sang’s Response, para. 7.

<sup>19</sup> Mr Sang’s Response, para. 8.

<sup>20</sup> Mr Sang’s Response, para. 9.

<sup>21</sup> Mr Sang’s Response, para. 10.

<sup>22</sup> Prosecutor’s Response, para. 4.

refuse giving evidence and will thus need to be sanctioned and compelled to appear.<sup>23</sup> Furthermore, the Prosecutor submits that Kenya's legislation allows for the implementation of the Impugned Decision and that Mr Ruto's submissions that Kenya would have to act under unregulated procedures lack merits.<sup>24</sup> In her view, in implementing the Impugned Decision, Kenya would be acting in accordance with a judicial decision rendered by the Court, applying its relevant domestic law.<sup>25</sup> The Prosecutor avers that the Impugned Decision is legally binding on Kenya "regardless of the hypothetical possibility that it might be overturned on appeal",<sup>26</sup> and that, based on Mr Ruto's arguments, no decision could ever be enforced as long as an appeal could still be launched, contrary to the principle that "suspensive effect is not automatic".<sup>27</sup> In the Prosecutor's view, Mr Ruto has failed to demonstrate that enforcement of the Impugned Decision would create an irreversible situation or would potentially defeat the purpose of the appeals at hand, should they be granted. This is because, in that case scenario, any step taken by Kenya could simply be nullified.<sup>28</sup>

## II. MERITS

6. Article 82 (3) of the Statute provides that, upon request, the Appeals Chamber may order suspensive effect. The Appeals Chamber recalls that it has consistently held that its decision to order that an appeal has suspensive effect is discretionary<sup>29</sup> and that, "when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances".<sup>30</sup> The Appeals Chamber has summarised the circumstances in which it has previously exercised its discretion to grant suspensive effect as follows:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) "would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the

<sup>23</sup> Prosecutor's Response, para. 6.

<sup>24</sup> Prosecutor's Response, para. 5.

<sup>25</sup> Prosecutor's Response, para. 7, referring to the Impugned Decision, paras 157-179.

<sup>26</sup> Prosecutor's Response, para. 7.

<sup>27</sup> Prosecutor's Response, para. 7.

<sup>28</sup> Prosecutor's Response, para. 7.

<sup>29</sup> See for example *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Request of the Prosecutor for Suspensive Effect", 3 September 2009, ICC-01/05-01/08-499 (OA 2), para. 11.

<sup>30</sup> *Prosecutor v. Mathieu Ngugjolo Chui*, "Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect", 20 December 2012, ICC-01/04-02/12-12 (OA), para. 18, referring to previous jurisprudence.

appellant”, (ii) would lead to consequences that “would be very difficult to correct and may be irreversible”, or (iii) “could potentially defeat the purpose of the appeal”.<sup>31</sup> [Footnotes omitted.]

7. Turning to the circumstances of the present case, the Appeals Chamber notes that the request for suspensive effect is limited to the aspect of the Impugned Decision that requests Kenya, if necessary, to compel the witnesses to appear before the Trial Chamber.

8. Without prejudice to the Appeals Chamber’s eventual judgment on the merits of the present appeals, the Appeals Chamber finds that Mr Ruto’s and Mr Sang’s submissions in support of the request for suspensive effect are unpersuasive. This is because none of their submissions show how the implementation of the Impugned Decision (i) would lead to an irreversible situation that could not be corrected; (ii) would lead to consequences that would be very difficult to correct and may be irreversible; or (iii) could potentially defeat the purpose of the appeal, were the Appeals Chamber eventually to find in favour of Mr Ruto and Mr Sang.

9. Notably, the Appeals Chamber considers that the potential effect that an enforcement of the Impugned Decision might have on the eight witnesses is, as the Prosecutor notes, largely speculative. As to the impact on Kenya, the Appeals Chamber recalls that article 93 of the Statute provides for procedural avenues in case a State Party considers that it cannot comply with a request for cooperation. Kenya may avail itself of these procedures if it considers this to be necessary. Finally, the Appeals Chamber is not persuaded that, if the witnesses testified before the Trial Chamber and if the Appeals Chamber subsequently overturned the Impugned Decision, this would have irremediable consequences on the trial itself. In the view of the Appeals Chamber, the arguments advanced by Mr Sang in this regard<sup>32</sup> are largely speculative and do not merit the granting of suspensive effect.

10. The Appeals Chamber recalls that suspensive effect is the exception, not the rule. In the case at hand, none of the applicable criteria are met. It appears to the Appeals Chamber that Mr Ruto’s request rather raises an issue pertaining to trial

<sup>31</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on the Admissibility and Abuse of Process Challenges’”, 9 July 2010, ICC-01/05-01/08-817 (OA 3), para. 11.

<sup>32</sup> See Mr Sang’s Response, paras 9 and 10.

management.<sup>33</sup> Even if the Appeals Chamber were to find that good trial management militates for not compelling the concerned witnesses to testify before the Appeals Chamber has delivered its judgment in the present appeals, it is not for the Appeals Chamber to take such decision, in circumstances where the criteria calling for suspensive effect are not met.

11. For the above reasons, and without prejudice to the Appeals Chamber's eventual decision on the merits of Mr Ruto's and Mr Sang's appeals against the Impugned Decision, the request for suspensive effect is rejected.

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

  
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**Judge Akua Kuenyehia**  
**Presiding Judge**

Dated this 17th June 2014

At The Hague, The Netherlands

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<sup>33</sup> This is made clear in Mr Ruto's Document in Support of the Appeal, para. 53 and related footnote 116.