

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-01/11  
Date: 10 February 2015

**TRIAL CHAMBER V(A)**

**Before:** Judge Chile Eboe-Osuji, Presiding  
Judge Olga Herrera Carbuccion  
Judge Robert Fremr

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
*THE PROSECUTOR v WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

**Public**

**Decision on the Sang Defence's Request for Reconsideration of Page and Time  
Limits**

**Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:**

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Mr Anton Steynberg

**Counsel for William Samoei Ruto**

Mr Karim Khan  
Mr David Hooper  
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Ms Shyamala Alagendra

**Counsel for Joshua Arap Sang**

Mr Joseph Kipchumba Kigen-Katwa  
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**Legal Representatives of Victims**

Mr Wilfred Nderitu

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber V(A)** (the ‘Chamber’) of the International Criminal Court (the ‘Court’) in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 64(2) and 67(1) of the Rome Statute (the ‘Statute’), Rules 101 and 134 of the Rules of Procedure and Evidence (the ‘Rules’), and Regulations 35 and 37 of the Regulations of the Court (the ‘Regulations’), renders the following ‘Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits’.

## I. PROCEDURAL HISTORY

1. On 19 June 2013, the Chamber issued an order requesting submissions from the parties and the Common Legal Representative for Victims (the ‘Legal Representative’) on issues related to the conduct of proceedings,<sup>1</sup> including submissions on whether or not ‘no case to answer’ motions should be allowed in the case.<sup>2</sup>
2. On 3 July 2013, the Office of the Prosecutor (the ‘Prosecution’),<sup>3</sup> the defence team for Mr Ruto (the ‘Ruto Defence’),<sup>4</sup> the defence team for Mr Sang (the ‘Sang Defence’, and together with the Ruto Defence: the ‘Defence’)<sup>5</sup> and the Legal Representative<sup>6</sup> filed their submissions.
3. On 9 August 2013, the Chamber rendered its decision on the conduct of the proceedings.<sup>7</sup> Amongst other things, this decision held that, in principle, the Chamber would allow the Defence to submit ‘no case to answer’ motions at the close of the Prosecution’s case.<sup>8</sup> The Chamber indicated that the reasons for

<sup>1</sup> Order Requesting Submissions on the Conduct of the Proceedings, ICC-01/09-01/11-778.

<sup>2</sup> ICC-01/09-01/11-778, para. 2(v).

<sup>3</sup> Prosecution Submissions on the Conduct of the Proceedings, ICC-01/09-01/11-794.

<sup>4</sup> Defence Submissions on the Conduct of the Proceedings, ICC-01/09-01/11-795.

<sup>5</sup> Sang Defence Submissions on the Conduct of the Proceedings, ICC-01/09-01/11-796.

<sup>6</sup> Corrigendum to the Submissions of the Common Legal Representative for Victims Pursuant to the “Order Requesting Submissions on the Conduct of the Proceedings” Issued on 19 June 2013, ICC-01/09-01/11-797-Corr.

<sup>7</sup> Decision on the Conduct of Trial Proceedings (General Directions), ICC-01/09-01/11-847-Corr.

<sup>8</sup> ICC-01/09-01/11-847-Corr, para. 32.

allowing such motions, as well as guidance regarding procedure and the applicable legal test, would be provided in due course.<sup>9</sup>

4. On 3 June 2014, the Chamber issued its 'Decision No.5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)' (the 'Decision').<sup>10</sup> The Decision included page and time limits for the submission of any 'no case to answer' motions: (i) the motion should not exceed 40 pages in length; and (ii) should be filed no later than 14 days following the last day of the Prosecution's case or, as applicable, of the presentation of any evidence by the Legal Representative or as requested by the Chamber.<sup>11</sup>
5. On 2 October 2014, the Sang Defence filed a request for reconsideration of the page and time limits set out in the Decision (the 'Request').<sup>12</sup>
6. On 20 October 2014, the Ruto Defence filed an application to join the Request.<sup>13</sup>
7. On 21 October 2014, the Prosecution filed its response to the Defence filings (the 'Prosecution's Response'), requesting the Chamber to reject the Request.<sup>14</sup>

<sup>9</sup> ICC-01/09-01/11-847-Corr, para. 32.

<sup>10</sup> ICC-01/09-01/11-1334.

<sup>11</sup> ICC-01/09-01/11-1334, para. 37.

<sup>12</sup> Sang Defence Request for Reconsideration of the Page and Time Limits Regarding the Defence 'no case to answer' Motion as determined in 'Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)', ICC-01/09-01/11-1585-Conf. On 27 October 2014, a public redacted version of the Request was filed (ICC-01/09-01/11-1585-Red).

<sup>13</sup> Ruto Defence Application to join the "Sang Defence Request for Reconsideration of the Page and Time Limits Regarding the Defence 'no case to answer' Motion as determined in 'Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)'", ICC-01/09-01/11-1611-Conf. On 28 October 2014, a public redacted version of the Ruto Defence Request was filed (ICC-01/09-01/11-1611-Red).

<sup>14</sup> Prosecution's Joint Response to Defence filings ICC-01/09-01/11-1585-Conf and ICC-01/09-01/11-1611-Conf, relating to the Reconsideration of the Page and Time Limits regarding the Defence 'no case to answer' Motion, ICC-01/09-01/11-1613-Conf.

## II. SUBMISSIONS

### *Sang Defence submissions*

8. The Sang Defence requests reconsideration of the page limit for a 'no case to answer' motion and the time limit within which such a motion must be filed.<sup>15</sup> It seeks the page limit to be extended to 100 pages. The Sang Defence also requests that the relevant time limit be moved to at least 30 days after the Defence gives oral notification of its intention to file a 'no case to answer' motion.<sup>16</sup>
9. The Sang Defence seeks reconsideration of the Decision on two grounds. First, the Sang Defence advances that, since the Decision was rendered, the Prosecution has submitted additional evidence, including documentary evidence and the testimony of hostile witnesses.<sup>17</sup> The Sang Defence submits that this renders the legal and factual analysis for a 'no case to answer' motion 'more complicated', thereby amounting to 'an important change in circumstances justifying reconsideration'.<sup>18</sup> In respect of documentary evidence, the Sang Defence additionally submits that, as some documents have only been admitted for a limited purpose and the receipt of submissions on weight were deferred, it needs to assess all such evidence in 'varying degrees' in its 'no case to answer' motion.<sup>19</sup>
10. Second, the Sang Defence submits that 'the right to be heard is an important fair trial right'<sup>20</sup> and that the parties have not been heard on the issue of the procedure or modalities to be followed in the event of a 'no case to answer' motion.<sup>21</sup> The Sang Defence states that the Chamber's order for submissions did not direct that submissions be made on procedure and modalities, and therefore submits that it

<sup>15</sup> Request, ICC-01/09-01/11-1585-Red, para. 3.

<sup>16</sup> Request, ICC-01/09-01/11-1585-Red, paras 4 and 34.

<sup>17</sup> Request, ICC-01/09-01/11-1585-Red, paras 20-28.

<sup>18</sup> Request, ICC-01/09-01/11-1585-Red, para. 25.

<sup>19</sup> Request, ICC-01/09-01/11-1585-Red, para. 28.

<sup>20</sup> Request, ICC-01/09-01/11-1585-Red, para. 13.

<sup>21</sup> Request, ICC-01/09-01/11-1585-Red, paras 16-18.

'has not had an opportunity to make submissions on the appropriate page and time limits'.<sup>22</sup>

11. The Sang Defence contends that greater page and time limits are required in order to 'fully realise the potential' of a 'no case to answer' motion to promote the administration of justice and the rights of the accused, pursuant to Articles 66(1) and 67(1) of the Statute.<sup>23</sup> It submits that substantive legal issues, including the definition of 'organisational policy' and the requirements of Article 25(3)(d), must be addressed in its 'no case to answer' motion, in addition to evidential analysis.<sup>24</sup> By way of reference to the total number of pages permitted for final trial briefs in other cases, the Sang Defence argues that 40 pages would be insufficient to assess the Prosecution's *prima facie* case.<sup>25</sup> Furthermore, it is submitted that the current time limit is less than the 21 days that is usually allocated to a party when it responds to a filing from another party. Consequently, the Sang Defence argues that 'given the length and importance' of the 'no case to answer' submissions it is necessary and reasonable to extend the time limit to 30 days.<sup>26</sup>

#### *Ruto Defence submissions*

12. The Ruto Defence joins the Request, agreeing that the 'parties were not heard on the procedure to be followed' when filing a 'no case to answer' motion and that 'new facts and circumstances have arisen', justifying the Request.<sup>27</sup>
13. The Ruto Defence submits that the 'factual and evidential complexity of the case' has changed since the Chamber issued the Decision, particularly regarding the testimony of hostile witnesses and evidence of non-testimonial nature, which means

<sup>22</sup> Request, ICC-01/09-01/11-1585-Red, paras 18-19.

<sup>23</sup> Request, ICC-01/09-01/11-1585-Red, para. 29.

<sup>24</sup> Request ICC-01/09-01/11-1585-Red, para. 30.

<sup>25</sup> Request, ICC-01/09-01/11-1585-Red, para. 31.

<sup>26</sup> Request, ICC-01/09-01/11-1585-Red, para. 32.

<sup>27</sup> ICC-01/09-01/11-1611-Red, paras 3 and 7.

that the Defence will have to make detailed submissions.<sup>28</sup> The Ruto Defence argues that, as the purpose of a 'no case to answer' motion is to give effect to the accused's right to a fair trial, it is important for the Defence to be able to properly make their submissions and it would therefore be reasonable to extend the time and page limit.<sup>29</sup>

*Prosecution submissions*

14. At the outset, the Prosecution submits that the Defence should have relied on the specific provisions that concern time and page limits – Regulations 35 and/or 37 of the Regulations – rather than framing the request as one for reconsideration under the general powers of the Chamber.<sup>30</sup> Consequently, the Prosecution submits that it would be within the Chamber's discretion to dismiss the Request on that basis.<sup>31</sup> The Prosecution also states that the Defence should have taken into account Rule 101 of the Rules, which requests the Court to 'facilitate fair and expeditious proceedings' when setting time limits and also asks participants to 'endeavour to act as expeditiously as possible, within the time limits ordered by the Court'.<sup>32</sup>
15. On the merits, the Prosecution submits that the Defence has failed to meet the requisite standard either for reconsideration or for variation of time and page limits under the Regulations; accordingly it requests the Chamber to reject the Request.<sup>33</sup>
16. Though the Sang Defence submits that the Defence not being given the opportunity to be heard on this matter amounts to an exceptional circumstance, the Prosecution states that the Chamber is under no obligation to do so and that, in respect of

<sup>28</sup> ICC-01/09-01/11-1611-Red, paras 4- 5.

<sup>29</sup> ICC-01/09-01/11-1611-Red, para. 4.

<sup>30</sup> Prosecution's Response, ICC-01/09-01/11-1613-Conf, para. 6.

<sup>31</sup> Prosecution's Response, ICC-01/09-01/11-1613-Conf, para. 6.

<sup>32</sup> Prosecution's Response, ICC-01/09-01/11-1613-Conf, para. 7.

<sup>33</sup> Prosecution's Response, ICC-01/09-01/11-1613-Conf, paras. 4, 8 and 15.

routine matters such as time and page limits, it 'may, in its discretion, dispense with such submissions'.<sup>34</sup>

17. Regarding the additional documentary evidence submitted by the Prosecution and the testimony of the hostile witnesses, the Prosecution argues that this does not amount to a new circumstance that would justify the variation of the time limits. It is submitted that, when the Chamber rendered its Decision, it had anticipated the testimonies, as the Chamber had already issued a decision authorising summonses, and the possibility of the summonsed witnesses proving hostile to the Prosecution had been 'extensively ventilated'.<sup>35</sup> The Prosecution further submits that there is 'nothing unanticipated' about the admission of documentary evidence, whether through witnesses or by way of written motion, that would warrant reconsideration.<sup>36</sup>
18. Finally, the Prosecution submits that the Defence has misunderstood the purpose and limited nature of a 'no case to answer' motion, and that matters such as 'legal definitions already settled by the Chamber' should rather be dealt with in the final submissions.<sup>37</sup> Similarly, the Prosecution contends that arithmetic comparisons with final trial briefs in relation to page limits are 'invalid'.<sup>38</sup> Consequently, the Prosecution submits that the page and time limits in the Decision are appropriate.<sup>39</sup>

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<sup>34</sup> Prosecution's Response, ICC-01/09-01/11-1613-Conf, para. 9.

<sup>35</sup> Prosecution's Response, ICC-01/09-01/11-1613-Conf, paras 10-11.

<sup>36</sup> Prosecution's Response, ICC-01/09-01/11-1613-Conf, para. 13.

<sup>37</sup> Prosecution's Response, ICC-01/09-01/11-1613-Conf, paras 14 and 16.

<sup>38</sup> Prosecution's Response, ICC-01/09-01/11-1613-Conf, para. 16.

<sup>39</sup> Prosecution's Response, ICC-01/09-01/11-1613-Conf, para. 17.



### III. ANALYSIS

19. The Statute does not provide guidance on reconsideration of interlocutory decisions,<sup>40</sup> but the Chamber considers that the powers of a chamber allow it to reconsider its own decisions, prompted by one of the parties or *proprio motu*.<sup>41</sup> Reconsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.<sup>42</sup> New facts and arguments arising since the decision was rendered may be relevant to this assessment.<sup>43</sup>

20. In the present case, the Chamber notes that, as submitted by the Prosecution, Regulations 35 and 37 of the Regulations, concerning time and page limits, are directly applicable and the Request might more appropriately have been brought pursuant to those provisions.

21. In respect of the Defence submissions, the Chamber notes that both the possibility of summonsed witnesses becoming hostile and/or recanting their testimony and the admission of further documentary evidence were clearly within the Chamber's contemplation at the time of issuing the Decision. Therefore, the Chamber is not persuaded that those developments amount to new facts and circumstances warranting reconsideration.

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<sup>40</sup> See Article 84 of the Statute expressly permitting revision of a final conviction or sentence in light of, *inter alia*, new evidence.

<sup>41</sup> Article 64(2) and (3) of the Statute; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705; Decision on the request to present views and concerns of victims on their legal representation at the trial phase, 14 December 2012, ICC-01/09-01/11-511, para. 6; Trial Chamber V(B), *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, ICC-01/09-02/11-863.

<sup>42</sup> See ICTR, Appeals Chamber, *Jean Uwinkindi v. The Prosecutor*, Decision on Uwinkindi's Motion for Review or Reconsideration of the Decision on Referral to Rwanda and the Related Prosecution Motion, 23 February 2012, ICTR-01-75-AR11bis, para. 11; ICTR, Appeals Chamber, *Juvénal Kajelijeli v. the Prosecutor*, Judgement, ICTR-98-44A-A, para. 203; ICTY, Appeals Chamber, *Prosecutor v. Zdravko Mucić et al.*, Judgment on Sentence Appeal, 8 April 2003, IT-96-21-Abis, para. 49. For similar criteria, see also ICC-01/09-02/11-863, para. 11; ICC-01/04-01/06-2705, para. 18 (the Chamber may reconsider past decisions when they are 'manifestly unsound and their consequences are manifestly unsatisfactory').

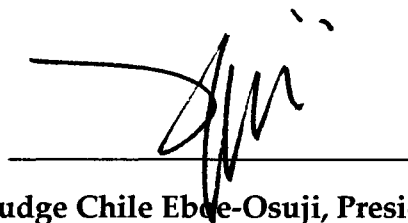
<sup>43</sup> ICC-01/09-02/11-863, para. 11.

22. The Chamber is also unpersuaded by the Defence submission regarding the lack of 'opportunity' to make submissions relevant to the requisite limits. The Chamber notes that the parties made submissions on matters which extended not only to whether or not a 'no case to answer' motion should be permitted, but the applicable test and the appropriate stage of the proceedings for bringing any such motion.
23. However, the Chamber notes that the Prosecution case is continuing and acknowledges the possibility of developments which might justify amendment of the time and/or page limits established in the Decision. The Chamber considers it premature to determine whether or not an amendment of the limits may be required at this time, and, if so, what the appropriate limits should be. Therefore, the present decision is without prejudice to any future application which may be brought in that regard.

**FOR THE FOREGOING REASONS THE CHAMBER HEREBY**

**REJECTS** the Request.

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



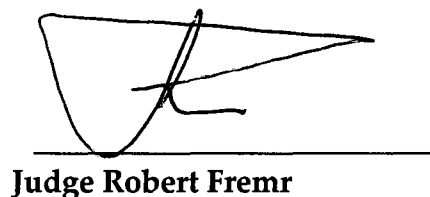
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**Judge Chile Eboe-Osuji, Presiding**



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**Judge Olga Herrera Carbuccion**



Handwritten signature of Judge Robert Fremr, featuring a stylized 'R' and 'F' followed by a horizontal line.

**Judge Robert Fremr**

Dated 10 February 2015

At The Hague, The Netherlands

No. ICC-01/09-01/11

10/10

10 February 2015