

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 19 June 2014

**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 redacted version of

Decision on Prosecutor's Second Supplementary Request to Summon a Witness

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  
Ms Shyamala Alagendra

**Counsel for Joshua Arap Sang**

Mr Joseph Kipchumba Kigen-Katwa  
Ms Caroline Buisman

**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**

Government of the Republic of Kenya

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Deputy Registrar**

**Detention Section**

**Victims and Witnesses Unit**

**Others**

**Victims Participation and Reparations  
Section**

Trial Chamber V(A) (the 'Chamber') of the International Criminal Court in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to articles 4, 21, 64(6)(b), 86, 93, 99(1) of the Rome Statute (the 'Statute') and rules 65 and 193 of the Rules of Procedure and Evidence (the 'Rules'), renders the following Decision on the Prosecutor's Second Supplementary Request to Summon a Witness.

## I. PROCEDURAL HISTORY

1. On 17 April 2014, the Chamber issued, by majority, Judge Herrera-Carbuccia dissenting, its 'Decision on Prosecutor's Application for Witnesses Summons and resulting Request for State Party Cooperation' ('Summons Decision').<sup>1</sup>
2. On 23 May 2014, upon request by the Defence, the Chamber, by majority, Judge Eboe-Osuji dissenting, granted leave to appeal the Summons Decision.<sup>2</sup>
3. On 5 June 2014, the Ruto Defence requested that the Appeals Chamber grant suspensive effect to parts of the Summons Decision.<sup>3</sup>
4. On 9 June 2014, the Office of the Prosecutor ('Prosecution') filed the 'Prosecution's second supplementary request to summon a witness' (the 'Request').<sup>4</sup>

<sup>1</sup> ICC-01/09-01/11-1274. Corrigenda of this decision were filed on 29 and 30 April 2014, ICC-01/09-01/11-1274-Corr and ICC-01/09-01/11-1274-Corr2 respectively. Judge Herrera-Carbuccia issued her dissenting opinion on 20 April 2014 (ICC-01/09-01/11-1274-Anx).

<sup>2</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 (including the PARTLY DISSENTING OPINION OF JUDGE EBOE-OSUJI), ICC-01/09-01/11-1313.

<sup>3</sup> 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, paras 50-53.

<sup>4</sup> ICC-01/09-01/11-1349-Conf-Exp, with confidential annex A. A confidential redacted version of this filing was notified on 28 the same date, ICC-01/09-01/11-1349-Conf-Red.

5. On 16 June 2014,<sup>5</sup> responses were filed by the defence teams for Mr Ruto (the 'Ruto Defence')<sup>6</sup> and Mr Sang (the 'Sang Defence')<sup>7</sup> (collectively, the 'Defence') and the Legal Representative for Victims.<sup>8</sup>

6. On 17 June 2014, the Appeals Chamber rejected the request for suspensive effect.<sup>9</sup>

## II. SUBMISSIONS OF THE PARTIES

7. The Prosecution requests the Chamber to summon Witness 604 by: a) requiring the witness's attendance before it to testify; b) requesting the assistance of the Government of Kenya in ensuring compliance with the summons and appearance of the witness; and c) making the appropriate arrangements for the security of the witness until [REDACTED] appears before the Court.<sup>10</sup>

8. The Prosecution asserts that the witness [REDACTED]. The Prosecution submits that Witness 604 is the sole prosecution witness who can speak to these events.<sup>11</sup> The Prosecution also states that the witness provides evidence [REDACTED],<sup>12</sup> [REDACTED] provides 'unique evidence which would materially assist the case'.<sup>13</sup>

<sup>5</sup> Pursuant to the Chamber's direction, responses were due by this date, Email Communication from Legal Officer of the Trial Chamber, 12 June 2014, at 11:55.

<sup>6</sup> Defence response to "Confidential redacted version of 'Prosecution's second supplementary request to summon a witness'", ICC-01/09-01/11-1365-Conf.

<sup>7</sup> Sang Defence Response to the "Confidential redacted version of 'Prosecution's second supplementary request to summon a witness'", ICC-01/09-01/11-1366-Conf.

<sup>8</sup> Common Legal Representative for Victims' Response to the Confidential Redacted Version of 'Prosecution's Second Supplementary Request to Summon a Witness', ICC-01/09-01/11-1367-Conf.

<sup>9</sup> Decision on Mr William Samoei Ruto's request for suspensive effect, ICC-01/09-01/11-1370 OA7 OA8.

<sup>10</sup> Request, ICC-01/09-01/11-1349-Conf-Red, para. 1.

<sup>11</sup> Request, ICC-01/09-01/11-1349-Conf-Red, paras 10-12.

<sup>12</sup> Request, ICC-01/09-01/11-1349-Conf-Red, para. 13.

<sup>13</sup> Request, ICC-01/09-01/11-1349-Conf-Red, para. 40.

9. The Prosecution confirms [REDACTED].<sup>14</sup> Although Witness 604 had confirmed [REDACTED] willingness to testify, [REDACTED] repeatedly failed to attend [REDACTED] in order to travel to The Hague to testify. [REDACTED] is currently unreachable.<sup>15</sup>

10. The Prosecution submits that it has 'exhausted all available means to persuade this witness to testify voluntarily' and that issuance of a summons is thus 'necessary, proportionate and adequate'.<sup>16</sup> The Prosecution further asserts that the Summons Decision is applicable, in spite the pending appeal. However, if the Summons Decision is overturned by the Appeals Chamber, the Prosecution admits that this would also impact its current application.<sup>17</sup>

11. The Prosecution finally requests the Chamber to shorten deadlines for responses 'in order to try to obtain resolution of the current request in time to include in the Registry's pending [request for assistance]'.<sup>18</sup>

12. The Ruto Defence reiterates its views – as expressed in its appeal against the Summons Decision – that 'the Trial Chamber has no power to compel the appearance of witnesses' and that the Chamber 'cannot obligate Kenya to enforce any summons issued by this Court'.<sup>19</sup> Notwithstanding, the Ruto Defence is cognisant that, unless the Summons Decision is reversed on appeal, the approach taken there prevails. As such, the Ruto Defence does not oppose the Request.<sup>20</sup>

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<sup>14</sup> Request, ICC-01/09-01/11-1349-Conf-Red, paras 15-18.

<sup>15</sup> Request, ICC-01/09-01/11-1349-Conf-Red, paras 20-35.

<sup>16</sup> Request, ICC-01/09-01/11-1349-Conf-Red, paras 36 and 39.

<sup>17</sup> Request, ICC-01/09-01/11-1349-Conf-Red, para. 37.

<sup>18</sup> Request, ICC-01/09-01/11-1349-Conf-Red, para. 41.

<sup>19</sup> ICC-01/09-01/11-1365-Conf, para. 4.

<sup>20</sup> ICC-01/09-01/11-1365-Conf, para. 6.

13. The Sang Defence reiterates its view that the Chamber has no power to issue a compulsory summons and that witnesses cannot be made to testify against their will.<sup>21</sup> However, it recognises it cannot litigate this matter anew before the Chamber.<sup>22</sup> The Sang Defence admits that the Request is sufficiently specific and that the Prosecution has established that a compulsory summons is necessary to obtain Witness 604's testimony.<sup>23</sup> However, the Sang Defence argues that the anticipated testimony is not relevant to Mr Sang and thus challenges the necessity of the witness's evidence to determine the truth.<sup>24</sup>

14. The Legal Representative for Victims supports the Request, although he admits that 'a fine balance will need to be struck between the competing interests' of the 'need to achieve truth and justice on the one hand and the need to expedite the proceedings on the other hand'.<sup>25</sup>

### III. ANALYSIS

15. As a preliminary matter, the Chamber notes that the Appeals Chamber has issued a decision addressing, and denying, the request for suspensive effect in relation to the Summons Decision.<sup>26</sup> Consequently, the submissions on that matter, as it relates to the Request,<sup>27</sup> are moot and are not considered further in this decision.

16. The Chamber recalls the findings of the Summons Decision that: (i) it has the power to compel the testimony of witnesses; (ii) pursuant to article 93(1)(d) and (l) of the Statute, it can, by way of requests for cooperation, obligate the Government of Kenya both to serve summonses and to assist in compelling the attendance (before the Chamber) of the

<sup>21</sup> ICC-01/09-01/11-1366-Conf, para. 3.

<sup>22</sup> ICC-01/09-01/11-1366-Conf, para. 4.

<sup>23</sup> ICC-01/09-01/11-1366-Conf, para. 6.

<sup>24</sup> ICC-01/09-01/11-1366-Conf, para. 6.

<sup>25</sup> ICC-01/09-01/11-1367-Conf, paras 4 and 6.

<sup>26</sup> ICC-01/09-01/11-1370 OA7 OA8.

<sup>27</sup> ICC-01/09-01/11-1365-Conf, para. 7.

witnesses thus summonsed; and (iii) there are no provisions in Kenyan domestic law that prohibit this kind of a cooperation request.<sup>28</sup> The Chamber also recalls that, in the Summons Decision, it was determined that:

[...] ‘any cooperation request to a State Party must satisfy the tripartite principles of (i) relevance, (ii) specificity and (iii) necessity’. In evaluating necessity in the context of whether to issue summonses to witnesses, the Chamber will consider both whether: (i) the witness’ anticipated testimony is potentially necessary for the determination of the truth (noting that the value of any witness’s testimony in a case may not be prejudged by the judge ahead of that witness’s testimony and its appropriate evaluation in due course) and (ii) a summons, as a compulsory measure, is necessary to obtain the testimony of the witness.<sup>29</sup>

17. The Chamber will now turn to the Request in order to determine whether it meets the aforesaid requirements.

18. As to relevance, the Chamber is satisfied by the Prosecution’s arguments that the testimony of Witness 604 is relevant to the case and the crimes charged. Although the Sang Defence argues that the expected testimony is not relevant to its client, Witness 604 is expected to testify about Mr Ruto’s alleged role in the post-election violence in [REDACTED], which is within the scope of the charges.

19. As to specificity, the Chamber is satisfied that the Prosecution has identified its relief sought with sufficient specificity. Witness 604 is clearly identified and, on the basis of the information provided by the Prosecution,<sup>30</sup> the Chamber is satisfied that Witness 604 is or may be within the jurisdiction of the Kenyan national authorities.

20. As to the first necessity consideration mentioned above, the Chamber is persuaded that Witness 604’s anticipated testimony is potentially necessary for the determination of the truth. The witness may provide important testimony on the crimes charged and the

<sup>28</sup> Summons Decision, ICC-01/09-01/11-1274- Corr2, para. 193. Judge Herrera Carbuccia ratifies her dissenting opinion (ICC-01/09-01/11-1274-Anx). However, in the current circumstances, the majority’s Summons Decision prevails and is being implemented, unless otherwise decided by the Appeals Chamber. Thus, she accepts the majority’s opinion for this specific case.

<sup>29</sup> Summons Decision, ICC-01/09-01/11-1274- Corr2, para. 181.

<sup>30</sup> Request, ICC-01/09-01/11-1349-Conf-Red, para. 4.

alleged individual criminal responsibility of the accused, particularly Mr Ruto. This information includes anticipated testimony regarding: [REDACTED] .<sup>31</sup>

21. As to the second necessity consideration mentioned above, the Chamber is also persuaded that a summons is necessary to obtain the testimony of Witness 604. The Prosecution has detailed reasonable attempts to obtain [REDACTED] voluntary cooperation, and has been unsuccessful. The Chamber further notes that the Defence does not contest that this necessity consideration is met in the present case.

22. In light of the above, the Chamber finds that justification exists for issuing the requested summons for Witness 604.

23. The Chamber further determines that the effects of the Summons Decision shall apply *mutatis mutandis* to the present decision, including any eventual determination to be made by the Appeals Chamber.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**GRANTS** the relief sought in the Request;

**REQUIRES** the appearance of Witness 604, as a matter of obligation upon him, to testify before this Trial Chamber by video-link or at a location in Kenya and on such dates and times as the Prosecutor or the Registrar (as the case may be) shall communicate to him;

**REQUESTS** the assistance of the Government of Kenya in ensuring the appearance of Witness 604 as indicated above, using all means available under the laws of Kenya; to

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<sup>31</sup> Request, ICC-01/09-01/11-1349-Conf-Red, paras 12-13.

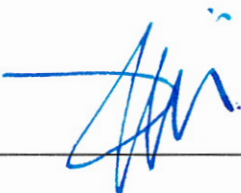
communicate to the concerned witness the Chamber's requirement of attendance as indicated above;

- (i) to facilitate, by way of compulsory measure as necessary, the appearance of Witness 604 for testimony before the Trial Chamber by video-link or at a location in Kenya and on such dates and times as the Prosecutor or the Registrar (as the case may be) shall indicate;
- (ii) to make appropriate arrangements for the security of the indicated witness until the witness appears and completes testimony before the Chamber;

**DIRECTS** the Registry to prepare and transmit, in consultation with the Prosecutor, the necessary subpoena to Witness 604 (with or without the assistance of the Government of Kenya) as well as the necessary cooperation request to the relevant authorities of the Republic of Kenya in accordance with articles 93(1)(d), 93(1)(l), 96 and 99(1) of the Statute, in accordance with this decision; and

**REJECTS** all other requests.

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**

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**Judge Robert Fremr**

Dated 19 June 2014

At The Hague, The Netherlands