

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 11 September 2015

APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng
Judge Silvia Alejandra Fernández De Gurmendi
Judge Christine Van Den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

Public

Public redacted version of “Ruto Defence request for extension of page and time limits”

Source: Defence for Mr. William Samoei Ruto

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

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I. Introduction

1. Pursuant to Regulation 37(2) of the Regulations of the Court ("Regulations") and in respect of its appeal against the corrigendum to the *Decision on Prosecution Request for Admission of Prior Recorded Testimony* ("Impugned Decision"),¹ the defence for Mr. William Samoei Ruto ("Defence") respectfully requests an extension of: (i) the page limit for its appeal brief to a total of 60 pages; and (ii) the time limit to file said brief of an additional 14 days, so that the brief would be due on 5 October rather than 21 September 2015.

II. Procedural background

2. On 22 April 2015, the Prosecution filed the *Prosecution request for an extension of page limit* ("Prosecution Extension Request") in which it requested an extension of the page limit to not more than 100 pages for its intended application pursuant to rule 68 of the Rules of Procedure and Evidence ("Rules").² On 23 April 2015, Trial Chamber V(A) partially granted the Prosecution Extension Request via e-mail by granting an extension of the page limit to a maximum of 80 pages.³
3. On 28 April 2015, the defence for both Mr. Ruto and Mr. Sang requested a three week extension to the deadline for filing responses to the Prosecution's intended application and an extension of the page limit for said responses to not more than 80 pages.⁴ The Prosecution did not oppose the defence requests.⁵ The defence requests were granted the same day.⁶

¹ ICC-01/09-01/11-1938-Conf-Corr; ICC-01/09-01/11-1938-Red-Corr.

² ICC-01/09-01/11-1864-Conf.

³ E-mail from Trial Chamber V-A Communications to counsel on 23 April 2015 at 10.13 a.m. (provided in Annex A hereto).

⁴ ICC-01/09-01/11-T-198-CONF-ENG ET, p. 28 line 15 to p. 29 line 6.

⁵ ICC-01/09-01/11-T-198-CONF-ENG ET, p. 29 lines 7-11.

⁶ ICC-01/09-01/11-T-198-CONF-ENG ET, p. 29 lines 14-15.

4. On 29 April 2015, the Prosecution filed the *Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses* ("Rule 68 Application").⁷ An addendum thereto was filed on 1 June 2015.⁸
5. On 9 June 2015, the Defence renewed its application for an extension of time to file its response to the Rule 68 Application by seeking an extension of two days. The Sang Defence joined this application, which was granted by the Trial Chamber the next day.⁹
6. On 12 June 2015, both the *Ruto Defence response to the "Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses"*,¹⁰ 99 pages in length, and the *Sang Defence Response to Prosecution's Request for the Admission of Prior Recorded Testimony of [REDACTED] Witnesses*,¹¹ 56 pages in length, were filed.¹²
7. On 19 August 2015, the *Decision on Prosecution Request for Admission of Prior Recorded Testimony* was rendered by a Majority of the Trial Chamber,¹³ with Judge Eboe-Osuji appending a separate, partly concurring opinion.¹⁴
8. On 25 August 2015, both the *Sang Defence Request for Leave to Appeal the Decision on Prosecution Request for Admission of Prior Recorded Testimony*¹⁵ and the *Ruto Defence application for leave to appeal the "Decision on Prosecution*

⁷ ICC-01/09-01/11-1866-Conf; ICC-01/09-01/11-1866-Red.

⁸ ICC-01/09-01/11-1894-Conf.

⁹ E-mail from Trial Chamber V-A Communications to counsel on 10 June 2015 at 10.33 a.m. (provided in Annex B hereto).

¹⁰ ICC-01/09-01/11-1908-Conf; ICC-01/09-01/11-1908-Red.

¹¹ ICC-01/09-01/11-1911-Conf; ICC-01/09-01/11-1911-Red.

¹² See ICC-01/09-01/11-T-206-CONF-ENG ET, p. 7 line 13 to p. 8 line 15 where the Trial Chamber granted the request of the Defence to be granted the "donation of the difference of Mr. Sang's page limit".

¹³ ICC-01/09-01/11-1938-Conf; ICC-01/09-01/11-1938-Red-Corr. A corrigendum was issued on 28 August 2015. See ICC-01/09-01/11-1938-Conf-Corr and ICC-01/09-01/11-1938-Red-Corr.

¹⁴ ICC-01/09-01/11-1938-Conf-Anx; ICC-01/09-01/11-1938-Anx-Red. A corrigendum was issued on 28 August 2015. See ICC-01/09-01/11-1938-Conf-Anx-Corr and ICC-01/09-01/11-1938-Anx-Red.

¹⁵ ICC-01/09-01/11-1939-Conf; ICC-01/09-01/11-1939-Red.

Request for Admission of Prior Recorded Testimony”¹⁶ were filed. The defence teams sought leave to appeal ten and eleven issues respectively.

9. On 31 August 2015, the Prosecution filed the *Prosecution’s Consolidated Response to Ruto Defence’s and Sang Defence’s applications for leave to appeal the “Decision on Prosecution Request for Admission of Prior Recorded Testimony,”* (ICC-01/09-01/11-1938-Conf, 19 August 2015).¹⁷
10. On 10 September 2015, the Trial Chamber granted leave to appeal in respect of the following seven issues:¹⁸
 - i. Whether the amended Rule 68 of the Rules can be applied in this case without offending Articles 24(2) and 51(4) of the Statute;
 - ii. Whether written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can qualify as 'prior recorded testimony' for the purpose of Rule 68(2)(c) and (d), to be admitted for the truth of their contents;
 - iii. Whether written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can be admitted in their entirety for the purpose of Rule 68 (2)(c) and (d);
 - iv. Whether the Impugned Decision erred in its assessment of the concept of 'failure to give evidence with respect to a material aspect' pursuant to Rule 68(2)(d)(i) of the Rules;
 - v. Whether the Impugned Decision applied the appropriate standard of proof when evaluating whether the conditions under Rule 68(2)(c) and (d) of the Rules were met, including, in particular, in its assessment of the existence of 'interference';

¹⁶ ICC-01/09-01/11-1940-Conf; ICC-01/09-01/11-1940-Red.

¹⁷ ICC-01/09-01/11-1945-Conf. No public redacted version of the Prosecution’s response has been filed.

¹⁸ ICC-01/09-01/11-1953-Conf. para. 20; ICC-01/09-01/11-1953-Red, para. 20.

- vi. Whether the Impugned Decision erred in its interpretation and/or application of the concepts of 'indicia of reliability' and 'acts and conduct of the accused' pursuant to Rule 68(2)(c) and (d) of the Rules; and
- vii. Whether the Impugned Decision erred in its consideration of 'interests of justice' pursuant to Rule 68(2)(d) of the Rules.

III. Applicable Law

11. Regulation 37(2) of the Regulations, which relates to page limits for documents filed with the Registry, provides:

- 1. A document filed with the Registry shall not exceed 20 pages, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.
- 2. The Chamber may, at the request of a participant, extend the page limit in exceptional circumstances.

12. In the context of appeals, exceptional circumstances justifying an extension of the page limit have been found to exist because of the nature of the issue/s on appeal and, thus, the type of submissions required to address those issues;¹⁹ the novelty of the issue/s and degree of complexity;²⁰ the number of issues;²¹ and the need to provide sufficient factual detail on appeal.²²

13. Regulation 35(2) of the Regulations permits a Chamber to "extend [...] a time limit if good cause is shown."²³

¹⁹ See, e.g., ICC-01/04-01/07-1546, para. 4.

²⁰ See, e.g., ICC-01/04-01/06-2205 OA15 OA16, para. 21; ICC-01/04-168, para. 4.

²¹ See, e.g., ICC-01/04-01/10-248, page 3.

²² See e.g., ICC-01/09-27, para. 4.

²³ See also ICC-01/05-01/08-631-Red OA2, para. 34, ICC-01/05-01/08-827 OA3, para. 6; ICC-02/11-01/11-189 OA, para. 4.

IV. Submissions

14. The Defence submits that exceptional circumstances, as required by Regulation 37(2), and good cause, as required by Regulation 35, exist and justify the requested extension of page and time limits respectively.
15. *First*, a total of seven issues have been certified for appeal. Accordingly, the Defence submits that an extension of the page and time limits is required in order to properly address each issue.
16. *Second*, the issues certified for appeal deal with a variety of complex legal areas. The complexity of the issues involved was previously cited by both the Prosecution and Defence in seeking and being granted extensions of the page and time limits in filing the underlying application and responses.²⁴ The appeal will require detailed and considered analysis of a plethora of legal questions arising from the application of amended Rule 68 in this case. Additionally, the Impugned Decision itself is a lengthy 61 pages, with Presiding Judge Eboe-Osuji's separate, partly concurring opinion²⁵ amounting to 17 pages.
17. *Third*, and related to the foregoing, the legal landscape is also new because this is the first time an application under amended Rule 68 has been judicially considered. The complexity and novelty of the application has been acknowledged by Prosecution counsel who stated that it is "a very complex application", "deals with...numerous...witnesses" and "a lot of evidence".²⁶ The legal complexity is reflected in the seven issues certified for appeal and

²⁴ See, e.g., ICC-01/09-01/11-1864-Conf, e-mail from Trial Chamber V-A Communications to counsel on 23 April 2015 at 10.13 a.m. (provided in Annex A hereto), ICC-01/09-01/11-T-198-CONF-ENG ET, p. 27 line 13 to p. 29 line 15; ICC-01/09-01/11-T-199-CONF-ENG ET, p. 5 lines 8-19, p. 8 lines 14-20.

²⁵ ICC-01/09-01/11-1938-Conf-Anx.

²⁶ ICC-01/09-01/11-T-192-CONF-ENG ET 25-03-2015, p. 31, lines 7-8.

provides the necessary basis for the granting of the extension of time and page limits.

18. *Finally*, the interpretation and application of amended Rule 68 to the trial process is a fundamental question that has not yet been considered by the Appeals Chamber. It is submitted that given the importance of the appeal, not only for the trial proceedings in the present case, but also for proceedings before the International Criminal Court more generally, it is in the interests of justice to allow the Defence to advance its arguments in proper detail, which will be facilitated by an extension of the page and time limits.

19. The Defence acknowledges that, if the requested relief is granted, the Prosecution may require an equivalent extension of the page and time limits. The Defence hereby indicates that it would not object to the same being granted, if requested by the Prosecution.

V. Classification

20. This request is filed confidentially because it refers to information – [REDACTED] – which has been treated as confidential information.

VI. Requested Relief

21. For the reasons set out above, the Defence respectfully requests the Appeals Chamber to grant an extension of:

- (a) the page limit for its appeal brief to a total of 60 pages; and
- (b) the time limit to file the appeal brief of an additional 14 days so that the brief would be due on 5 October rather than 21 September 2015.

Respectfully submitted,



Karim A.A. Khan QC

Lead Counsel for Mr. William Samoei Ruto

Dated this 11th Day of September 2015
At The Hague, Netherlands