

**Cour
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**International
Criminal
Court**



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No.: ICC-01/09-01/11
Date: 16 September 2015

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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***

Confidential

**Prosecution's response to Sang Defence second request for reconsideration of
page limit**

Source: Office of the Prosecutor

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

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Introduction

1. The Defence for Mr Sang ("Sang Defence") requests¹ an extension of the page limit for its 'No Case to Answer' motion from 40 to 100 pages. The basis for the Request is "that the 'factual and evidential complexity of the case' has changed"² since the Chamber issued its Decision³ rejecting the Sang Defence's Request for Reconsideration of Page and Time Limits,⁴ most notably in respect of the admission of the written statements of five witnesses.⁵ As a result of the admission of those written statements, the Sang Defence submits that it would have to make "additional and detailed submissions to incorporate the newly admitted material."⁶
2. The Prosecution opposes the Sang Defence Request, as it does not meet the threshold for reconsideration. The complexity of the case has not changed such that an injustice could occur if the decision were not altered, nor was there any clear error of reasoning in the Reconsideration Decision. The Chamber stated in its Reconsideration Decision 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 ['No Case to Answer'] Decision. Therefore, the Chamber is not persuaded that those developments amount to new facts and circumstances warranting reconsideration."⁷ Thus, the Sang Defence has not established that the evidence now admitted in terms of the Rule 68 Decision was not within the contemplation of the Chamber at the time it issued the Reconsideration Decision.

¹ ICC-01/09-01/11-1963-Conf ("Sang Defence Request").

² Sang Defence Request, para. 6.

³ ICC-01/09-01/11-1813 ("Reconsideration Decision").

⁴ ICC-01/09-01/11-1585-Red.

⁵ Being the Decision on Prosecution's Request for admission of Prior Recorded Testimony, ICC-01/09-01/11-1938-Conf-Corr ("Rule 68 Decision") wherein the Chamber admitted the prior written statements of five Prosecution witnesses. The Decision is pending Appeal. See also Sang Defence Request, para. 6.

⁶ Sang Defence Request, para. 7.

⁷ Reconsideration Decision, para. 21.

3. As regards the need to address in the alternative both the Prosecution evidence with and without the written statements admitted pursuant to the Rule 68 Decision, this change in circumstances is not so exceptional as to justify reconsideration afresh of the page limit, particularly given the limited scope of the evidence involved.
4. Accordingly, the Sang Defence has failed to show any exceptional reasons to warrant a fresh reconsideration of the previous refusal to extend the page limit and hence the present Request should be rejected too. Alternatively, should the Chamber consider that exceptional circumstances justifying reconsideration have been established, the Prosecution submits that an increase of five pages would be ample to address any additional argument necessitated by the limited change in circumstances.

Confidentiality

5. In accordance with regulation 23*bis* of the Regulations of the Court, the Prosecution files this Response as 'confidential', since it responds to a filing of similar classification. The Sang Defence Request was filed confidentially as it refers to a Decision⁸ of the Chamber which was filed confidentially. However, the Prosecution notes that the information referred to in paragraph 6 of the Sang Defence Request⁹ also appears in the Public redacted version of the Rule 68 Decision. Accordingly, the Prosecution is of the view that both this Response and the Sang Defence Request may be reclassified as Public.

⁸ Rule 68 Decision.

⁹ Referring to the confidential version of the Rule 68 Decision, ICC-01/09-01/11-1938-Conf-Corr.

Submissions

6. This Chamber has recently found that despite the Rome Statute not explicitly providing guidance on reconsideration of interlocutory decisions, “the powers of a chamber allow it to reconsider its own decisions, prompted by one of the parties or *proprio motu*. 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. New facts and arguments arising since the decision was rendered may be relevant to this assessment.”¹⁰
7. The Prosecution submits that the Rule 68 Decision¹¹ does not materially alter the situation that existed at the time the Reconsideration Decision was rendered. The admitted material is not “new documentary evidence”.¹² The Defence has been on notice that the Prosecution intended to lead the evidence described in the admitted statements since 9 January 2013 for four of the five witnesses and 24 October 2013 for the fifth witness, when they appeared on the Prosecution’s List of Evidence.¹³ The Defence is not faced with a new, exceptional, or unprecedented situation in which it must analyse brand new evidence.¹⁴ The Prosecution submits that the Defence must have anticipated that there was a possibility the written statements *could* be admitted – as the Chamber did when it handed down its Reconsideration Decision.
8. According to this Chamber, the ultimate aim of a ‘No Case to Answer’ procedure is to provide “a means to achieve greater judicial economy and

¹⁰ ICC-01/09-01/11-1813, para. 19.

¹¹ ICC-01/09-01/11-1938-Conf-Corr.

¹² Sang Defence Request, para. 7.

¹³ ICC-01/09-01/11-540-AnxA-Red and ICC-01/09-01/11-1065-Conf-Anx1-Red.

¹⁴ The litigation regarding the admission of the written statements in question has been running since 29 April 2015 and the Defence has been on notice at least since the first recanting witness testified in September 2014 that the Prosecution intended to seek the admission of the prior recorded testimony of witnesses who were subjected to improper interference .

efficiency in a manner which promotes the proper administration of justice and the rights of an accused.”¹⁵

9. The Defence laments that it will be required to make “additional and *detailed* submissions to incorporate the newly admitted material (emphasis added)” and as such requests a substantial page limit increase for its ‘No Case to Answer’ submissions. The Prosecution submits that the ‘No Case to Answer’ motion does *not* require an exhaustive analysis of the evidence, nor an evaluation of *all* the evidence presented by the Prosecution.¹⁶ The Chamber clearly spelled out the test in its “Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on ‘No Case to Answer’ Motions)”: For each count in the Document Containing the Charges, “it is only necessary to satisfy the test in respect of one mode of liability [...] The Chamber will not consider questions of reliability or credibility relating to the evidence, save where the evidence in question is incapable of being believed by any reasonable Trial Chamber.”¹⁷ The Chamber also stressed that “[s]uch motions should not be pursued on a merely speculative basis or as a means of raising credibility challenges that are to be considered at the time of final deliberations. Nor should they be filed merely to shape the Chamber view as to the strength of the Prosecution case thus far presented”.¹⁸ Therefore, the basis for the Sang Defence’s Request is unsound – the Chamber does not require the sort of detailed submissions on the evidence at the ‘No Case to Answer’ stage that it would in a Final Brief at the end of the trial. Such submissions would exceed the scope and purpose of a ‘No Case to Answer’ motion.

¹⁵ ICC-01/09-01/11-1334, para. 16.

¹⁶ ICC-01/09-01/11-1334, para. 24.

¹⁷ ICC-01/09-01/11-1334, para.32.

¹⁸ ICC-01/09-01/11-1334, para. 39.

10. The Prosecution submits that the only relevant change in circumstances since the Reconsideration Decision was issued is that, in light of the pending appeal against the Rule 68 Decision, the Chamber has advised the Parties to deal in the alternative with the record including and excluding the witness statements in question.¹⁹ The Prosecution submits, however, that this change in circumstances is not so exceptional as to justify reconsideration afresh of the page limit. Significantly, the Sang Defence grossly exaggerates the extent of the documentary evidence admitted pursuant to the Rule 68 Decision. It does *not* amount to “**1,669 pages** of new documentary evidence”, as alleged,²⁰ but only **370 pages in total**, comprising six written statements totalling 149 pages and annexes totalling 221 pages.²¹ The Prosecution submits that this is not a significant volume of material that the Defence are obliged to deal with in the alternative, especially when compared to the approximately 18,900 pages²² of testimonial evidence given to date by the 29 witnesses on record.
11. Alternatively, should the Chamber consider that the Sang Defence has discharged the burden of demonstrating that exceptional circumstances exist justifying a reconsideration of the page limit, the Prosecution submits that the requested extension of 60 pages is manifestly excessive, bearing in mind the limited volume of material involved and the circumscribed nature and scope of the ‘No Case to Answer’ procedure. The Prosecution submits that an additional **five pages** would be more than adequate to accommodate any additional submission that might be required by the Chamber’s advice to deal in the alternative with the evidence including and excluding the additional witness statements.

¹⁹ ICC-01/09-01/11-1955.

²⁰ Sang Defence Request, para. 7.

²¹ See ICC-01/09-01/11-1866-Conf-AnxA2. This excludes the evidence of P-0637, which was not admitted by the majority.

²² This estimate is based on 189 transcripts of evidence up to and including 29 January 2015 (P-0743) at approximately 100 pages per transcript.

Relief

12. For the reasons above, the Prosecution requests that the Chamber reject the Sang Defence Request to extend the page limit for its anticipated 'No Case to Answer' motion from 40 pages to 100 pages.



Fatou Bensouda, Prosecutor

Dated this 16th day of September 2015

At The Hague, The Netherlands