Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **27 October 2014**

TRIAL CHAMBER V(A)

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

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 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, 2 October 2014

Source: **Defence for Mr. Joshua arap Sang**

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

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I. INTRODUCTION

1. On 3 June 2014, Trial Chamber V(A) ("Chamber") rendered its *Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)* ("Decision");[1] the Presiding Judge issued a separate opinion.[2] The Decision established the standard and procedure to be used in relation to 'no case to answer' Motions.

2. In the Decision, the Chamber held that submissions in support of a 'no case to answer' Motion were not to exceed 40 pages in length ("page limit"), with the length of the submissions in response to be determined at a later date.[3] Alternatively, in the interests of efficiency, responses to a 'no case to answer' Motion may also be made orally, as prescribed by the Chamber.[4] In relation to the time limit, the Chamber determined that such a Motion must be filed within 14 days after the defence provides notification of an intention to file such a Motion – this notification must be done orally, no later than the last day of the Office of the Prosecutor's ("Prosecution") case ("time limit").[5]

3. The Defence for Mr. Joshua arap Sang ("the Defence"), hereby requests reconsideration of the page limit for a 'no case to answer' Motion and the time limit within which it must file such a Motion.

4. It is submitted that the page and time limits should be reconsidered on the basis that the parties were not heard on this issue before the Decision was released, and new facts and circumstances have arisen since 3 June 2014 that necessitate the relief sought. The current page and time limits will significantly curtail the ability of the Defence to address the law and facts pertaining to the charges and the Prosecution's *prima facie* case. Thus, in order to give proper effect to the fair trial rights a 'no case to answer' Motion seeks to promote,[6] the Defence requests a page limit of at least 100 pages and at least 30 days to file said Motion after oral notification is given.

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[1] ICC-01/09-01/11-1334.
[2] ICC-01/09-01/11-1334-Anx-Corr.
[3] ICC-01/09-01/11-1334, para 37.
[4] *Ibid.*
[5] ICC-01/09-01/11-1334, para 37.
[6] ICC-01/09-01/11-1334, para 16.

5. This Request has been filed as confidential, with a public redacted version made available, because it refers to confidential Prosecution and Registry filings and details relating to the status of Prosecution witnesses.

II. PROCEDURAL HISTORY

6. On 19 June 2013, the Chamber formally requested submissions from the parties on issues related to the conduct of proceedings pursuant to Article 64(3)(a) of the Statute.[7] This included a request for submissions to be made on whether or not 'no case to answer' Motions should be permitted in the current case.[8]

7. All parties to the case filed their submissions in response to the Chamber's order on 3 July 2013, and were in support of permitting said Motion.[9] No submissions were made as to the length or timing of such a Motion because to do so would have been premature at that stage.

8. The Chamber issued its *Decision on the Conduct of Trial Proceedings (General Directions)* on 9 August 2013, permitting the defence to "… enter submissions, at the close of the case for the Prosecution, asserting that there is no case for it to answer at the end of the Prosecution's presentation of evidence."[10] At that time, the Chamber indicated that it would provide at a later date the reasons for permitting 'no case to answer' Motions, and guidance as to the procedure and applicable legal standard.[11]

9. On 3 June 2014, the Chamber, in its Decision, provided the legal basis and rationale for allowing a 'no case to answer' Motion;[12] the applicable legal standard, including the scope of such a Motion;[13] and set out the timing and

[7] Order requesting submissions on the conduct of the proceedings, ICC-01/09-01/11-778.
[8] ICC-01/09-01/11-778, para. 2 (v).
[9] Prosecution submission on the conduct of proceedings, ICC-01/09-01/11-794 ; Defence Submissions on the Conduct of Proceedings, ICC-01/09-01/11-795 ; Sang Defence Submissions on the Conduct of Proceedings, ICC-01/09-01/11-796 ; 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; a corrigendum was filed on 3 July 2013, ICC-01/09-01/11-797-Corr.
[10] ICC-01/09-01/11-847-Corr, para. 32.
[11] *Ibid,* para 32.
[12] ICC-01/09-01/11-1334, paras 10-18.
[13] *Ibid,* paras 22-32.

procedure to be followed by the parties.[14] In terms of the procedure to be used, the Decision established that:[15]

i. The defence must, no later than the last day of the Prosecution's case or on completion of presentation of evidence by the Common Legal Representative for Victims, notify the Chamber orally of the intention to file such a motion;

ii. Submissions in support of a 'no case to answer' Motion must be filed within 14 days after providing oral notification;

iii. Submissions are not to exceed 40 pages and "shall specify the particular counts being challenged"; and

iv. Submissions in response are to be filed 14 days later (with the length of such submissions to be determined in due course) or, if deemed more efficient by the Chamber, such responses would be heard during an oral hearing.

III. APPLICABLE LAW

Reconsideration

10. While the Rome Statute does not expressly provide for the reconsideration of a procedural decision, Trial Chambers have held that reconsideration is nevertheless permissible,[16] and compatible with Article 64(2) and (3).[17] Accordingly, a Trial Chamber can reconsider its own decisions, "prompted by (one of) the parties or *proprio motu*."[18]

11. Reconsideration of a decision, as per this Court's jurisprudence, may be appropriate where "new facts or circumstances that may influence that decision" are proffered,[19] or when decisions "are manifestly unsound and their

[14] *Ibid,* paras, 34-39.
[15] ICC-01/09-01/11-1334, para 37.
[16] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, ICC-01/04-01/06-2705, 30 March 2011, para 18, *cited* with approval by Trial Chamber V(B) in *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, ICC-01/09-02/11-863, 26 November 2013, para 11.
[17] ICC-01/09-02/11-863, para 11 and note 33.
[18] *Ibid*, para 11.
[19] *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of the Decision on the "Demande de miseen liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en

consequences are manifestly unsatisfactory."[20] Consequently, reconsideration will only occur in exceptional circumstances.[21]

12. The International Criminal Tribunals for the former Yugoslavia and Rwanda, which also lack an express power to reconsider decisions, have held that circumstances justifying reconsideration can include new facts or new arguments.[22]

The Right to be Heard

13. The right to be heard is an important fair trial right. In the context of *propio motu* decision-making, the Appeals Chamber of the International Criminal Tribunal for former Yugoslavia held that:

> The fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. The Rules must be read on this basis, that is to say, that they include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber.[23]

14. The Defence submits that the ICC should adopt a similar approach. In this regard, the learned Presiding Judge in his recent dissent in *The Decision on 'Warrant of arrest for Abdallah Banda Abakaer Nourian'*, dissented in part on the basis that none of the parties or participants – particularly the defence for Mr. Banda – were given the opportunity to be heard.[24]

IV. SUBMISSIONS

15. The Defence advances two grounds in support of reconsideration, namely that the parties have not been heard with respect to the length and timing of the 'no

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République Démocratique du Congo" of 2 September 2011, ICC-01/05-01/08-1691-Red, 6 September 2011, para 17.
[20] ICC-01/04-01/06-2705, para 18.
[21] ICC-01/09-02/11-863, para 11.
[22] Ibid, para 11 and note 37.
[23] *Prosecutor v. Goran Jelsi*, IT-95-10-A, 5 July 2001, para 27.
[24] *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Dissenting Opinion of Judge Eboe-Osuji in the Decision on 'Warrant of arrest for Abdallah Banda Abakaer Nourain', ICC-02/05-03/09-606-Anx-Corr, 15 August 2014, paras 8 and 18.

case to answer' Motion, and new facts and circumstances have arisen since the Decision was made.

The Parties Have Not Been Heard

16. It is submitted that the parties have not been previously heard on this issue.

17. The International Criminal Court has not previously entertained 'no case to answer' Motions, and thus there was no established procedure in place at the time the Chamber rendered its Decision.

18. The Chamber originally ordered parties to file submissions on whether 'no case to answer' Motions requesting dismissal of one or more counts at the conclusion of the prosecution's case should be allowed in the case.[25] The parties were not at that time directed to address the procedure or modalities to be followed.

19. In this context, it is submitted that the Defence has not had an opportunity to make submissions on the appropriate page or time limits for 'no case to answer' Motions, and this exceptional circumstance supports reconsideration. In line with the Chamber's order, the parties submissions in relation to the conduct of proceedings focused on whether or not 'no case to answer' Motions should be allowed in this case and the applicable legal standard.[26] They did not address the particular procedure to be adopted, given it was not known at that stage if the Chamber would permit such a Motion to be made.

New Facts and Circumstances

20. The Defence submits that since the Decision was rendered, new facts and circumstances have arisen which necessitate reconsideration and further justify the relief sought:

i. Witness Testimony

21. When the Chamber issued its Decision on 3 June 2014, it was not known whether the key witnesses who were subject to its *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation* ("Summons

[25] ICC-01/09-01/11-778, para 2(v).
[26] ICC-01/09-01/11-796, para 10; ICC-01/09-01/11-795, paras 12-18; ICC-01/09-01/11-794, para 7.

Decision")[27] would appear and, indeed, what they would say if and when they appeared. Yet presently, four witnesses have indeed been served summonses,[28] and three have completed testifying.[29] A further five summonses are outstanding,[30] [REDACTED].

22. If the appeals against the impugned Summons Decision are denied,[31] or if the testimony of all nine summoned witnesses is heard and not excluded for any reason in the event the appeal is allowed, then the Defence will have to address this evidence in its 'no case to answer' Motion.

23. In addition to the summons witnesses, [REDACTED],[32] [REDACTED].[33]

24. Accordingly, the increased likelihood of further significant Prosecution witnesses testifying, and the lengthy nature of their anticipated evidence, justifies reconsideration of the page and time limits.

25. Moreover, not only are more significant Prosecution witnesses now testifying or likely to testify in the future, but the hostile nature of their testimony (actual or anticipated) amounts to a further important change of circumstance justifying reconsideration. To date, four summonsed witnesses have been declared hostile.[34] [REDACTED],[35] [REDACTED],[36] [REDACTED],[37] [REDACTED][38] [REDACTED][39], [REDACTED]. It is submitted that such testimony renders the necessary legal and factual analysis in a 'no case to answer' Motion more complicated, particularly in terms of whether or not a witness is incapable of

[27] ICC-01/09-01/11-1274-Corr2, 30 April 2014.
[28] Registry's transmission of the proof of service of the summonses to appear for Witness 604, Witness 495, Witness 516 and Witness 323, ICC-01/09-01/11-1480-Conf, 2 September 2014.
[29] P-0604, P-0495 and P-0516.
[30] P-0015, P-0016, P-0397, P-0336.
[31] 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-Corr, 5 June 2014; (Ruto) 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, 5 June 2014.
[32] [REDACTED]
[33] [REDACTED]
[34] P-0604 was declared hostile, *as per* ICC-01/09-01/11-T-131-CONF-ENG, 8 September 2014, pp 94-96; P-0495 was declared hostile, *as per* ICC-01/09-01/11-T-139-CONF-ENG, 18 September 2014, p 13; P-0516 was declared hostile, *as per* ICC-01/09-01/11-T-144-CONF-ENG, 25 September 2014, pp 32-33; P-0637 was declared hostile, *as per* ICC-01/09-01/11-T-149-ENG RT, 2 October 2014, pp 2-3.
[35] [REDACTED].
[36] [REDACTED].
[37] [REDACTED].
[38] [REDACTED].
[39] [REDACTED].

belief. The Defence will need to engage in a *prima facie* assessment of the evidence lead by the Prosecution as to witness interference, along with the veracity of the contents of the initial witness statements themselves (if any application under Rule 68 is granted). Consequently, it is submitted that the nature of the testimony of the summonsed witnesses to date, and the likelihood of this continuing, amounts to an important change of circumstance justifying reconsideration.

ii. Documentary Evidence

26. On 10 June 2014, the Chamber admitted 26 documents into evidence in its *Decision on the Prosecution's Request for Admission of Documentary Evidence*.[40] Of significance, those documents include security incident reports,[41] medical reports,[42] reports by domestic bodies into the post-election violence,[43] and an election report by an external monitoring body.[44] This is in addition to the documentary evidence that had already been admitted into evidence through expert witnesses Messrs Maupeu[45] and Bromley.[46]

27. Furthermore, during the testimony of P-0247, documents connected to the Commission of Inquiry into Post-Election Violence ("CIPEV") were admitted into evidence.[47] Further such documents were admitted through P-0013,[48] and the Defence awaits the Prosecution's written application for admission of additional significant CIPEV documents,[49] which the Prosecution has indicated will cover sections of CIPEV's Final Report (KEN-OTP-0001-0364) and Investigation Section Final Report and Gender-Based Violence Report (KEN-OTP-0001-1288).[50]

28. The Chamber, in admitting portions of these documents, or admitting the documents only for a limited purpose, has noted that the parties will make

[40] ICC-01/09-01/11-1353.
[41] EVD-T-OTP-00069 – 00080.
[42] EVD-T-OTP-00081 – 00086.
[43] EVD-T-OTP-00063 and EVD-T-OTP-00064.
[44] EVD-T-OTP-00062,
[45] EVD-T-OTP-00043, as translated in EVD-T-OTP-00044.
[46] EVD-T-OTP-00046 – 000057.
[47] EVD-T-OTP-00089 – 00091, 00093 and 00094.
[48] EVD-T-OTP-00121 – 00131.
[49] ICC-01/09-01/11-T-124-ENG, 10 July 2014, p 2, line 15 – p 3, line 6.
[50] *Ibid*, and ICC-01/09-01/11-T-124-ENG, 10 July 2014, pp 50-57 and 63-64.

submissions as to their weight and usage at the appropriate time.[51] All such evidence will need to be assessed by the Defence in varying degrees in its 'no case to answer' submissions and further necessitates reconsideration of the page and time limits.

Submissions in Support of Page and Time Limits Sought

29. In the Decision, the Chamber determined that 'no case to answer' Motions were of utility to the conduct of the trial - "a 'no case to answer' Motion has the potential to contribute to a shorter and more focused trial, thereby providing a means to achieve greater judicial economy and efficiency..."[52] Such a process would promote the administration of justice and the rights of the accused as reflected in Articles 66(1) and 67(1) of the Statute.[53] The Defence submits that to fully realise the potential of a 'no case to answer' Motion, greater page and time limits are required.

30. As part of its 'no case to answer' Motion, the Defence must address several substantive legal issues, as well as the lack of evidence to support the charges against its client. The Defence deems it necessary and appropriate at this stage to, inter alia, argue the definition of 'organisational policy' and whether the facts point to the existence of a Network of which Mr. Sang was a member. Furthermore, it is necessary to assess the definition of Article 25(3)(d) and whether the evidence prima facie demonstrates that Mr. Sang indeed contributed to the commission of the crimes as charged, through what he is alleged to have said on the radio or by any other means. Both the question of 'organisational policy' and this mode of liability have been the focus of much debate at the pre-trial and trial levels before the ICC and amongst scholars, but neither has been conclusively resolved. Of course, these central issues must be addressed in addition to any analysis of whether the Prosecution evidence may be found 'incapable of belief', and whether the crime base evidence fits within the temporal and geographic scope of the charges.

[51] *See*, for example, Chamber's rulings during testimony of P-0247: ICC-01/09-01/11-7-116-CONF-ENG, 16 June 2014, p 37, lines 15-25 concerning using documentary evidence for incriminatory purposes, and p 93, lines 15-24 concerning the admission of EVD-T-OTP-00091 (KEN-OTP-0005-8554).
[52] ICC-01/09-01/11-1334, para 16.
[53] *Ibid.*

31. While recognising a 'no case to answer' Motion is more limited than submissions made in a final brief at the close of a case, it is submitted that some guidance can be found in the page limits prescribed for such briefs. In *Lubanga,* Trial Chamber I extended the page limits for closing submissions to 250 pages for the Prosecution and 300 pages for the Defence and replies were also permitted.[54] In *Katanga and Ngudjolo,* the Prosecution and two Defence teams were allocated 300 pages each,[55] which was subsequently extended by 50 pages for both parties (350 pages total).[56] In *Bemba*, the Prosecution and Defence were each allocated 400 pages for their final briefs.[57] By the time the Prosecution has closed its case, roughly half of the case will have been heard. The evidence of approximately 30 witnesses will be on record. Thus it is reasonable for the Defence to seek nearly half of the total amount of pages that may be required for a final brief. Certainly, the Defence requires more pages than those allowed for the parties' final written submissions at Confirmation (50 pages).[58] In any event, the Defence submits that 40 pages, a bare fraction of the aforementioned page limits, is inadequate to assess the Prosecution's *prima facie* case.

32. Likewise, even if the Defence is diligently preparing for its 'no case to answer' Motion as the Prosecution case progresses, it is not possible for the Defence to comprehensively analyse and draft the required submissions in a mere 14 days following oral notification of the same. This is less time than the 21 days usually allowed to respond to a filing by another party. Given the length and importance of the half-time submissions, it is necessary and reasonable to extend the drafting period to 30 days.

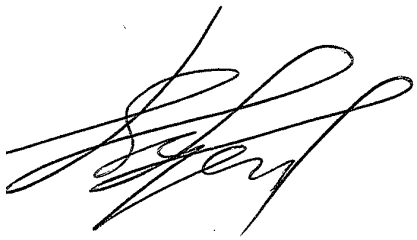
V. CONCLUSION AND RELIEF REQUESTED

33. The Defence appreciates that as per the Chamber's Decision, "the objective of the 'no case to answer' assessment is to ascertain whether the Prosecution has lead

[54] *The Prosecutor v. Thomas Lubanga Dyilo*, Order on the timetable for closing submissions, ICC-01/04-01/06-2722, 12 April 2011, para 3.
[55] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Public redacted version of Order on the arrangements of the submission of the written and oral closing statements (regulation 54 of the Regulations of the Court), ICC-01/04-01/07-3218-Red-tENG, 27 November 2012, para 12.
[56] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Decision on the requests of the parties and participants for an extension of the page limit for their written closing submissions, ICC-01/04-01/07-3249-tEng, 22 February 2012, p 4.
[57] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the timeline for the completion of the defence's presentation of evidence and issues related to the closing of the case, ICC-01/05-01/08-2731, 16 July 2013, para 33.
[58] ICC-01/09-01/11-T-12-ENG, 8 September 2011, p 77, lines 8-13.

sufficient evidence to necessitate a defence case, failing which the accused is to be acquitted on one or more of the counts", and that the test to be applied is "whether or not, on the basis of a *prima facie* assessment of the evidence, there is a case, in the sense of whether there is sufficient evidence adduced on which, if accepted, a reasonable Trial Chamber *could* convict the accused".[59] While the Defence must limit its submissions to the *prima facie* nature of the allegations, it still requires sufficient pages and time in which to assess all relevant evidence.

34. Given the significance of the 'no case to answer' Motion for Mr. Sang, and for the aforementioned reasons, the Defence respectfully requests the Chamber to reconsider the page limit for the 'no case to answer' Motion and extend the page limit to at least 100 pages, and extend the time limit to at least 30 days upon providing oral notification.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 27th day of October 2014
In Nairobi, Kenya

[59] ICC-01/09-01/11-1334, para. 23.