

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **27 June 2011**

**PRE-TRIAL CHAMBER II**

**Before: Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Cuno Tarfusser**

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF THE PROSECUTOR *v.* WILLIAM SAMOEI RUTO,  
HENRY KIPRONO KOSGEY, AND JOSHUA ARAP SANG**

**Public Document**

**Prosecution's Request for Leave to Reply to the "Response on behalf of Henry Kiprono Kosgey to the 'Prosecution's Second Application pursuant to Rules 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing'"**

**Source: Office of the Prosecutor**

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

**The Office of the Prosecutor**

Mr. Luis Moreno-Ocampo, Prosecutor  
Ms. Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

Mr. Kioko Kilukumi Musau, Mr. Joseph Kipchumba Kigen-Katawa, Mr. David Hooper QC, Mr. Kithure Kindiki, Mr. George Odinga Oraro, Mr. Julius Kipkosgei Kemboi, Mr. Allan Kosgey, Mr. Joel Kimutai Bosek and Mr. Philemon K.B. Koech

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for Victims**

Ms. Paolina Massidda

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

**States' Representatives**

Sir Geoffrey Nice QC  
Mr. Rodney Dixon

**Amicus Curiae**

**Other**

**REGISTRY**

---

**Registrar**

Ms. Silvana Arbia

**Deputy Registrar**

Mr. Didier Preira

**Victims and Witnesses Unit**

**Defence Support Section**

**Detention Section**

**Victims Participation and Reparations  
Section**

Ms. Fiona McKay

**Other**

## I. Introduction

1. On 15 June 2011, the Defence for Mr. Henry Kiprono Kosgey filed the “Response on behalf of Henry Kiprono Kosgey to the ‘Prosecution’s Second Application pursuant to Rules 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing”<sup>1</sup> (‘Kosgey Defence Response’). This filing purportedly responded to the “Prosecution’s Second Application pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing” (“Prosecution’s Second Application”).<sup>2</sup>
2. The Kosgey Defence Response, however, does not truly respond to the Prosecution’s Second Application. It makes affirmative new arguments, and thus should be treated as a substantive new filing. Purporting to be a response and not an affirmative request for relief, it also intends to deny the Prosecution its rightful opportunity to answer. Accordingly, the Prosecution files this Application for leave to reply.
3. In seeking leave to reply, however, the Prosecution does not propose to submit a new document. The Kosgey Defence Response effectively copies another filing previously made by Mr. Sang and Mr. Ruto, to which the Prosecution has already responded. The Prosecution thus will request that that response be deemed to also reply to the Kosgey Defence Response.

---

<sup>1</sup> ICC-01/09-01/11-132.

<sup>2</sup> ICC-01/09-01/11-105-Conf-Red (and public redacted version ICC-01/09-01/11-105-Red).

## II. Procedural History

4. On 23 May 2011, the Prosecution filed the “Prosecution’s First Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing” (‘First Application’).<sup>3</sup> On 26 May 2011, the Prosecution filed a public redacted version of the First Application.<sup>4</sup>
5. On 30 May 2011, the Defence for Mr. Sang and Mr. Ruto filed an urgent request for additional information concerning the Prosecution’s First Application and for immediate disclosure of the redacted materials (‘Defence Request’).<sup>5</sup> On 20 June 2011 the Prosecution responded to the issues raised in the Defence Request.<sup>6</sup>
6. On 3 June 2011, the Prosecution filed the “Prosecution’s Second Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing” (‘Second Application’), which rests on the same arguments submitted in its First Application as the basis for the requested redactions.
7. On 15 June 2011 the Defence for Mr. Kosgey filed the Kosgey Defence Response to the Second Application which, although titled a “response”, makes affirmative arguments and addresses issues not raised in the Second

---

<sup>3</sup> ICC-01/09-01/11-96-Conf-Exp. The original deadline of 15 May 2011 for the Prosecution’s proposed redactions with respect to the evidence collected prior to 15 December 2010 (see ICC-01/09-01/11-62) was extended to 23 May 2011 (see ICC-01/09-01/11-82).

<sup>4</sup> ICC-01/09-01/11-96-Red. The Prosecution did not file public redacted versions of the annexes.

<sup>5</sup> “Urgent Defence Request for Additional Information Concerning the ‘Prosecution’s First Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing’, and for Immediate Disclosure of Redacted Materials”, ICC-01/09-01/11-110.

<sup>6</sup> ICC-01/09-01/11-132.

Application. The substance of his “responsive” argument instead is identical to the claim formulated by the Defence for Messrs. Sang and Ruto in its 30 May Defence Request.

### III. Submissions

8. Regulation 24(5) of the Regulations of the Court provides that “Participants may only reply to a response with the leave of the Chamber, unless otherwise provided for in these Regulations”. The deadline for filing a reply is ten days.<sup>7</sup> The Regulations do not specify the grounds upon which a request for leave to reply may be granted. Chambers of this Court have granted leave to reply on various grounds such as when submissions would be of assistance to the Chamber,<sup>8</sup> or considering the importance and potential effect of the issues on the ongoing process of disclosure.<sup>9</sup>
9. The Prosecution contends that the Kosgey Defence Response seeks affirmative relief and addresses substantive issues that were not the subject, even indirectly, of the Prosecution’s Second Application. Because it touches on new issues, it properly should be considered an original and independent brief rather than a response to the Prosecution’s Second Application.
10. The Prosecution submits that Pre-Chamber II (“the Chamber”) cannot fairly accept the arguments raised in the Kosgey Defence Response without allowing the Prosecution to respond. For that reason, the Prosecution requests leave to reply to the Kosgey Defence Response.

---

<sup>7</sup> Regulation 34(c).

<sup>8</sup> Trial Chamber IV, “Decision on the defence request for leave to reply”, 11 May 2011, ICC-02/05-03/09-147.

<sup>9</sup> Pre-Trial Chamber I, “Decision on the Prosecution’s request for leave to reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”, 24 February 2011, ICC-01/04-01/10-61.

11. Because of the similarity of the arguments advanced in the Kosgey Defence Response to those raised by Mr. Ruto and Mr. Sang in their 30 May Defence Request,<sup>10</sup> should the Chamber grant the Prosecution's request for leave to reply, the Prosecution will rely on and incorporate by reference the submissions already advanced in the Prosecution's 20 June Response.<sup>11</sup>

#### **IV. Relief Sought**

12. For the above reasons, the Prosecution requests leave to reply to the "Response on behalf of Henry Kiprono Kosgey to the 'Prosecution's Second Application pursuant to Rules 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing'" and to incorporate by reference the submissions advanced in the "Prosecution's Response to the 'Urgent Defence Request for Additional Information Concerning the 'Prosecution's First Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing', and for Immediate Disclosure of Redacted Materials".



---

Luis Moreno-Ocampo, Prosecutor

Dated this 27<sup>th</sup> day of June 2011

At The Hague, The Netherlands

---

<sup>10</sup> See para. 5 and fn. 5, above.

<sup>11</sup> ICC-01/09-01/11-134.