

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-01/11**
Date: **14 September 2015**

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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

**Prosecution's consolidated response to the joint Defence request for extension of
time limit to submit a "no case to answer" motion**

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 Ruto (“Ruto Defence”) requests¹ an extension of the time limit to submit its “no case to answer” motion until 14 days after it has filed its appeal brief in the pending appeal² against the “Rule 68 Decision”.³ The basis for the request is that the time limit overlaps with the time limit for the filing of its appeal brief in the Rule 68 Appeal.
2. The Defence for Mr Sang (“Sang Defence”) also joins the request on the same grounds, but in addition relies on the need to respond to the Prosecution’s pending request under regulation 55(2) for the legal re-characterisation of the charges against Mr Sang.⁴
3. However, both Defence teams have simultaneously requested a 21 day extension of the time limit for filing their appeal briefs. The Prosecution has not opposed that request in principle, but has argued that a 14 day extension is reasonable in the circumstances.⁵
4. The Prosecution submits that a 14 day extension of the time limit to file the appeal brief would allow the Defence 10 clear days to finalise the brief after it has filed the “no case to answer” motion, which is reasonable in the circumstances. Even more so if the full 21 days is granted.
5. Additionally, the Defence have already had over seven months to analyse the evidence presented in the Prosecution case and nearly a month to incorporate the prior recorded testimony admitted by the Chamber on 19 August.⁶ Thus, the fact that the Defence has already had a considerable time to prepare their

¹ ICC-01/09-01/11-1959 (“Ruto Defence Request”).

² “Rule 68 Appeal”.

³ ICC-01/09-01/11-1938-Conf-Corr.

⁴ ICC-01/09-01/11-1951; (“Regulation 55(2) Request”).

⁵ At the time of filing, the Prosecution response had not yet been notified. The Appeals Chamber’s decision is awaited.

⁶ ICC-01/09-01/11-1938-Conf-Corr.

“no case to answer” submissions is a factor that the Chamber should take into account in determining the present request.

6. Nevertheless, in light of the pending Regulation 55(2) Request, the Prosecution does not oppose a limited extension of the time period to file the “no case to answer” motions, provided that the Prosecution is given a similar indulgence.

Submissions

7. The last Prosecution witness to testify on the merits of the case concluded his testimony on 29 January 2015.⁷ Additionally, 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.⁸ The Defence has accordingly had at least seven months to analyse the Prosecution evidence and work on its “no case to answer” submissions. Although the admission of the prior statements of the compelled witnesses was uncertain, it was certainly a possibility that must have been envisaged by the Defence. Through the exercise of due diligence, their preparations ought to have been at an advanced stage already.⁹
8. The Prosecution also takes issue with the Sang Defence submission that it could not have anticipated that it would be granted leave to appeal.¹⁰ If a party files a request for leave to appeal, it must clearly anticipate the possibility that it will be granted. The Prosecution observes that filing a request for leave to appeal in the belief that it had no prospects of success would amount to an abuse of process.

⁷ P-0743; ICC-01/09-01/11-T-189-CONF-ENG.

⁸ The statements were formally admitted by the Chamber almost a month ago on 19 August; ICC-01/09-01/11-1938-Conf-Corr.

⁹ In particular in light of the Chamber’s “Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits” (ICC-01/09-01/11-1813, para. 21).

¹⁰ ICC-01/09-01/11-1960, para 4.

9. While it is true that the Defence teams requested an extension of the timetable for the submission of “no case to answer” motions until after the decision of the Appeals Chamber on the Rule 68 Decision, they could not take for granted that this would be granted. The Chamber has now provided a reasonable solution to the dilemma of potentially duplicative litigation and this no longer presents an obstacle to the case proceeding as expeditiously as possible.¹¹
10. The Prosecution also notes that despite relying on the concurrent filing obligations in the Rule 68 Appeal, neither Defence team discloses in their requests to this Chamber that they have simultaneously sought a 21 day extension from the Appeals Chamber for the filing of their appeal briefs. The Prosecution has not opposed the extension in principle, but submitted that a 14 day extension would suffice, provided a similar extension is granted to the Prosecution. If this limited relief were granted, the Defence appeal briefs would fall due on 5 October and the Prosecution response on 30 October 2015.
11. However, despite the foregoing, the Prosecution accepts that the pending Regulation 55(2) Request, which the Prosecution itself has requested to be decided prior to the “no case to answer” litigation,¹² may provide a reasonable ground for the modification of the filing timetable. However, the Prosecution leaves the determination of what may be reasonable in the circumstances to the discretion of the Chamber.
12. However, the Prosecution notes that depending on the outcome of the pending Defence request for extension of the time limit for the filing of the appeals brief, the Prosecution may also be required to simultaneously respond to the appeals briefs and the “no case to answer” motions. Should the Chamber exercise its discretion to modify the time periods for the Defence to file their “no case to answer” motions, the Prosecution requests, in the

¹¹ ICC-01/09-01/11-1955, para. 5.

¹² ICC-01/09-01/11-1951.

interests of fairness and equality of arms, that it be afforded a similar indulgence.

Relief

13. For the reasons above, the Prosecution does not oppose a limited extension of the time line for filing the “no case to answer” motions, in the discretion of the Chamber, provided the Prosecution is granted a similar indulgence.



Fatou Bensouda, Prosecutor

Dated this 14th day of September 2015
At The Hague, the Netherlands