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TRIAL CHAMBER V(A)

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

Public

Defence Application for Leave to Reply to "Prosecution's response to the Defence requests to appoint an *amicus* prosecutor"

Source: Defence for Mr. William Samoei Ruto

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

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I. Introduction

1. In the *“Prosecution’s response to the Defence requests to appoint an amicus prosecutor”* (*“Response”*)¹ the Prosecution misrepresents or misapprehends the nature of the relief requested in the *“Ruto Defence request to appoint an amicus prosecutor”* (*“Request”*).² By misrepresenting or misapprehending the Request, the OTP seeks to avoid having to initiate an investigation into conduct by various individuals which may amount to offences under Article 70 of the Rome Statute. Additionally, in the Response, the Prosecution makes the serious accusation that defence counsel *“has either intentionally or recklessly brought the ICC and its officials into disrepute and is thus in breach of the Code of Professional Conduct.”*³
2. In these circumstances, the defence for Mr. William Samoei Ruto (*“Defence”*) respectfully requests that it be given leave to reply to the Response in order to address the discrete issues arising from the Prosecution’s misrepresentation or misapprehension of the Request and to address the serious accusations made against counsel.
3. If the Chamber grants leave to submit a reply, the Defence requests that the time limit specified in Regulation 34(c) of the Regulations of the Court (*“Regulations”*) be extended so that the reply is to be filed within five days of notification of the Trial Chamber’s decision granting leave.
4. A public redacted version of the Response has been filed.⁴ This request is filed publicly because it does not refer to any confidential information or evidence.

¹ ICC-01/09-01/11-2031-Conf and ICC-01/09-01/11-2031-Red.

² ICC-01/09-01/11-2028-Conf.

³ Response, para. 3.

⁴ ICC-01/09-01/11-2031-Red.

II. Standard for Granting Leave to Reply

5. Regulation 24(5) of the Regulations states that: *“Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations.”*
6. Regulation 34(c) of the Regulations further provides: *“Subject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days of notification in accordance with regulation 31 of the response.”*
7. The Court’s legal instruments do not provide for the standard which must be satisfied for leave to reply to be granted. However, leave has been granted where: the applicant has shown “good cause”;⁵ when new and distinct issues of law and fact are raised;⁶ when facts have been misrepresented;⁷ the importance and potential effect of the issues raised necessitate additional submissions being made;⁸ and, simply where the Trial Chamber considers it might benefit from receiving further observations.⁹ Indeed, this Trial Chamber, when sitting as Trial Chamber (V), has previously applied a holistic approach when considering an application for leave to reply.¹⁰

III. Good cause exists for granting leave to reply

8. Good cause exists to grant leave to reply in order that the Defence be permitted to address the Prosecution’s misrepresentation or misapprehension of the nature of the Request. This misrepresentation or misapprehension leads the Prosecution into error regarding the threshold required to initiate an investigation and the factors which properly need to be taken into account at this preliminary stage. In addition, leave to reply is warranted to permit the Defence to address the new and distinct issue raised by the Prosecution that defence counsel has potentially

⁵ See e.g. ICC-01/05-01/08-294, para. 3 (“Having considered the Application, the Single Judge is of the opinion that the Defence has shown good cause to grant leave to reply to the Prosecutor's Response.”).

⁶ ICC-01/04-01/10-61, pp. 3-4.

⁷ ICC-02/05-03/09-294-Red, para. 6(iv).

⁸ ICC-01/04-01/10-61, pp. 3-4; ICC-01/04-01/07-1004-tENG, para. 3.

⁹ ICC-01/09-02/11-679, para. 9.

¹⁰ ICC-01/09-02/11-530, para. 5 (“In all the circumstances, the Chamber is of the view that it may benefit from receiving further observations from the prosecution concerning the three issues raised in paragraph 2 of the Request.”).

acted contrary to Article 24(1) of the Code of Professional Conduct (“Code”) and that referral to the Registrar or censure should be considered. The importance and potential effect of this claim necessitates additional submissions being made.

9. As stated, the Prosecution misrepresents or misapprehends the nature of the Request. The correct position is that the Defence is simply asking for an investigation to be initiated into the conduct of certain witnesses and ICC staff members which might constitute offences under Article 70. The Defence maintains that there appears to be sufficient evidence of such Article 70 offences warranting an independent and impartial investigation by an *amicus* prosecutor. If leave is granted, the Defence will argue that the Prosecution’s failure to properly acknowledge the preliminary and investigatory nature of the Request results in the Prosecution improperly seeking to raise the threshold required to initiate an investigation. In support of the Defence’s argument it is observed, at this stage, that it is apparent that the Prosecution has fallen into error from the Prosecution’s arguments concerning: (i) what is required “to achieve a conviction” and, thus, its assertion that “[m]uch of the material relied upon by the Ruto Defence does not even approach this standard of cogency”;¹¹ and (ii) what would require to be proved beyond reasonable doubt in any successful prosecution.¹²
10. In the absence of any investigatory steps having been taken by the Prosecution, it is clear that such standards of cogency cannot have been reached. It would be precipitous - and entirely wrong - to make a determination about the strength of evidence, or prospects of a conviction, without an investigation. It is for precisely this reason that the Defence has requested an independent, meaningful investigation. The only additional safeguards requested by the Defence are certain minimum measures designed to protect the fair trial rights of the Defence and the subsequent full and proper investigation of these allegations. It is

¹¹ Response, para. 35.

¹² Response, para. 31.

pertinent to note that an evidential basis has been provided for the allegations that cannot be gainsaid by mere assertion by the Prosecution. By seeking to determine the ultimate credibility and cogency of the complaints raised by the Defence, in the absence of the requested investigation, it is submitted that the Prosecution has clearly misrepresented or misapprehended the Defence submissions.

11. In addition, the Defence submits that additional submissions are required regarding the serious accusation that there has been a breach of Article 24(1) of the Code. If leave to reply is granted, the Defence will set out in detail why such an allegation is unwarranted and entirely devoid of any merit. In summary, the Defence will argue that no organ of this Court or any of its staff is exempt from legitimate public scrutiny. In this regard, it is relevant to note that the investigation into allegations made by four individuals under the Court's protection programme that they had been subject to sexual abuse by a former ICC staff member working in the Democratic Republic of Congo was the subject of a public press release by the Registrar.¹³ The initiation of the investigation was made public from the outset. The Registrar did not make the investigation public only at its conclusion and on receipt of the determination that one individual would bear criminal responsibility for the alleged crimes if proven.
12. The Defence will also argue that the Prosecution's characterisation of its allegations as "unsubstantiated, sensationalist, and in some cases gratuitous"¹⁴ is without merit and itself gratuitous. The Defence approach in the Request was circumspect - it did not identify any individual staff member or specific organ of the Court. Further, the Defence repeatedly stated that the information relied

¹³ See ICC Press Release, "ICC internally inquires on allegations of sexual abuse by former ICC staff member", 12 April 2013 available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr895&ln=en>.

¹⁴ Response, para. 3.

upon “may” show¹⁵ (as opposed to “does” show) the “possible” commission of Article 70 offences by ICC staff.¹⁶

13. In addition – and revealingly - the Defence will note that information materially identical to the allegations concerning ICC staff members which the Prosecution now complains about was included in the “*Public redacted version of Corrigendum of Ruto Defence response to the ‘Prosecution’s request for the admission of prior recorded testimony of [REDACTED] witnesses’*” as long ago as 23 June 2015, without a murmur of Prosecution objection.¹⁷ The effect of this silence by the Prosecution will also be addressed.
14. Finally, the Defence cannot be held responsible for misreporting by the media. However, if leave is granted, the Defence will advise the Chamber in detail of the immediate steps which were taken to contact newspapers by defence counsel in order to correct the erroneous reporting and to request the publication of a retraction.¹⁸

IV. Relief Requested

15. For the reasons set out above, the Defence respectfully requests that the Trial Chamber grant leave to reply to the Response under Regulations 24(5) and 34(c) of the Regulations.
16. Should the Trial Chamber grant leave, the Defence requests that the time limit specified in Regulation 34(c) of the Regulations be extended so that the reply is to be filed within five days of notification of the Trial Chamber’s decision to grant leave.

¹⁵ Request, paras. 3, 33, 35, 43.

¹⁶ Request, para. 35.

¹⁷ See ICC-01/09-01/11-1908-Corr-Red, para. 49 (“...The Defence does not dispute that there are leaks and notes that OTP disclosures reveal that: (i) [REDACTED] clearly know, not only the names of [REDACTED], but also [REDACTED]; (ii) OTP witnesses have “good” sources within the ICC who update them on [REDACTED]; (iii) OTP witnesses allege that ICC staff are engaged in sexual relations with witnesses [REDACTED]; and (iv) OTP witnesses allege ICC staff are being bribed by witnesses...” (footnotes omitted)).

¹⁸ Response, para. 3.

Respectfully submitted,



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Dated this 26th Day of May 2016
At The Hague, Netherlands