

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **27 May 2016**

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

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 Prosecution opposes, in part, the “Defence Application for leave to reply to the ‘Prosecution’s response to the Defence request to appoint an *amicus* prosecutor’” (“Defence Application”).¹ The Defence Application has failed to demonstrate that good cause exists justifying a reply on the “issues arising from the Prosecution’s misrepresentation or misapprehension of the Request”.² In that respect, not only does the Defence seek to invoke a second opportunity to further argue issues that it already fully canvassed in its initial Defence Request³, it does so by making substantive arguments in the guise of demonstrating why its Application is appropriate, contrary to regulation 24(4) and (5) of the Regulations of the Court (“Regulations”) and the jurisprudence of this Court.

2. The Prosecution does not oppose the Defence Application wherein it seeks to address the issue related to a possible breach of the Code of Professional Conduct for Counsel (“Code”). While this issue is immaterial to the Chamber’s ultimate determination of the merits of the Defence Request, the Prosecution acknowledges that the Defence should be nevertheless allowed to make further submissions on this discreet point as a matter of fairness.

Procedural history

3. On 2 May 2016, the Ruto Defence filed the Defence Request and on 18 May, the Sang Defence filed its Response,⁴ wherein it joined the Ruto Defence in seeking appointment of an *amicus* prosecutor.

¹ ICC-01/09-01/11-2032.

² Defence Application, paras. 2, 8.

³ ICC-01/09-01/11-2028-Conf.

⁴ ICC-01/09-01/11-2030.

4. On 24 May, the Prosecution filed its Response to the Defence Request (“Prosecution Response”) and on 26 May, the Ruto Defence filed the Defence Application.

Submissions

5. The Prosecution responds to the Defence Application without prejudice to its previous position that Defence have no standing to bring a request or application before Trial Chamber V(A) (“Chamber”), as the Chamber is no longer seized with the case against Messrs Ruto and Sang, and lacks the necessary jurisdiction to entertain the Defence Request. The Prosecution incorporates its submissions by reference.⁵
6. Chambers of this Court have at times granted leave to reply pursuant to Regulation 24(5) of the Regulations of the Court if good cause to do so can be shown. There are no formal criteria for the authorisation of requests for leave to reply, however jurisprudence of this Court shows that the Chamber will, as a matter of principle, only grant leave to reply “when the issue is novel or of particular importance.”⁶ Various Trial Chambers have allowed additional replies to be filed when new and distinct issues of law and fact are raised,⁷ when the importance and potential effect of the issues necessitate additional submissions,⁸ when the Chamber considers it might benefit from receiving further observations,⁹ or when facts have been misrepresented.¹⁰

A. Impermissible Substantive Reply

7. The Defence identifies two issues it seeks leave to reply to (i) the Prosecution’s misrepresentation or misapprehension of the Defence Request and (ii) the

⁵ See generally, Prosecution Response, paras. 10-22.

⁶ ICC-01/04-01/07-3382, para. 8.

⁷ ICC-01/04-01/10-61, pp. 3-4.

⁸ *Ibid.*

⁹ ICC-01/09-02/11-679, para. 9.

¹⁰ ICC-02/05-03/09-294-Red, para. 6(iv).

Prosecution's accusations of misconduct against counsel.¹¹ The Defence then proceeds to make substantive submissions on the two issues without first awaiting the Chamber's leave to do so. Regulation 24(4) and (5) of the Regulations stipulate that participants may only reply to a document, which itself is a response or reply, with the leave of the Chamber. Moreover, this Chamber has previously admonished the Parties that "for future applications [they were] to refrain from including submissions of reply in the request for the leave to reply itself."¹² The Defence has clearly not heeded the requirements of regulation 24(4) and (5) or the directions of the Chamber.

B. The alleged Prosecution's misrepresentation or misapprehension of the Defence Request is not allowable ground for reply

8. The Defence's assertion that the Prosecution misrepresented or misapprehended the Defence Request does not warrant leave to reply.¹³ The Prosecution submits that alleged misrepresentation or misapprehension of the "nature" of the Defence Request¹⁴ do not amount to 'misrepresentation of facts'.¹⁵ Instead, the Defence is attempting to revive and repeat the same arguments it already made in its original Request.¹⁶
9. The Prosecution does not raise any new and distinct issues of law and/or fact in its Response, and no additional submissions on the issue by way of reply will assist the Chamber in its determination of the original Request. As such, the Prosecution requests that the Chamber dismiss the Defence Application on this ground.

¹¹ Defence Application, para. 2.

¹² ICC-01/09-01/11-822-Conf, para. 11.

¹³ Defence Application, para. 8.

¹⁴ Defence Application, para. 9.

¹⁵ As per decision ICC-02/05-03/09-294-Red, para. 6(iv).

¹⁶ The Defence rehashes its original argument in the Defence Application – see paras. 9-10.

C. Defence counsel's alleged professional misconduct may be allowable grounds for reply

10. The Defence seeks leave to reply on a second issue: that the Prosecution made serious allegations of misconduct against Defence counsel. The Prosecution acknowledges that this issue does arise from its Response, but notes that it neither relates to the merits of the Defence Application, nor is it relevant for the Chamber's ultimate determination. However, the Prosecution concedes that the Defence may have an interest in addressing this issue and that "the potential effect of this claim necessitates additional submissions being made."¹⁷ As such and as a matter of fairness, the Prosecution does not oppose the Defence Application on this limited issue.

Conclusion

11. The Prosecution does not oppose the Ruto Defence's request to file further submissions in reply to the Prosecution Response on the restricted issue regarding a potential breach of the Code by Defence Counsel for Mr Ruto. The Prosecution submits that the remainder of the Defence Application ought to be dismissed for the reasons set out above.



Fatou Bensouda, Prosecutor

Dated this 27th day of May 2016

At The Hague, the Netherlands

¹⁷ Defence Application, para. 8.