

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/09-02/11
Date: 17 September 2012

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND UHURU MUIGAI
KENYATTA***

Confidential

Motion to strike the "Joint Defence Response to the 'Prosecution's Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450'", or in the alternative, request for leave to reply

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

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**Unrepresented Applicants for
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**The Office of Public Counsel for
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Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Prosecution hereby requests the Chamber to strike the Joint Defence Response to the "Prosecution's Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450" ("Defence Submission") from the record of the case and to disregard it when considering the parties' disputes regarding the Updated DCC.¹ In the alternative, the Prosecution seeks leave, pursuant to Regulation 24(5) of the Regulations of the Court, to reply to the Defence Submission.

Confidentiality

2. Regulation 23*bis*(2) requires that this request be classified as "confidential" because it refers to the Defence Submission, which was filed confidentially. The Defence Submission does not, however, explain why confidential treatment is warranted, and there is no apparent reason for such a classification. The Prosecution respectfully suggests that unless the Defence provides a "factual and legal basis for the chosen classification",² it would be appropriate for the Defence Submission and this document to be reclassified as public.³

Background

3. On 5 July 2012, the Chamber issued an order directing the Prosecution to provide the Defence with a draft Updated DCC by 6 August 2012, and instructing the parties "to liaise *inter se* with a view to resolving any areas of disagreement as to whether the drafted updated DCC properly reflects the Confirmation Decision" ("Order").⁴ The Chamber ordered that "any points of disagreement that could not be resolved

¹ ICC-01/09-02/11-481-Conf.

² Regulation 23*bis*(1).

³ See ICC-01/09-02/11-482, paras 5-8.

⁴ ICC-01/09-02/11-450, para 8.

during *inter partes* consultations are to be raised in the form of a jointly submitted prosecution-defence annex to the updated DCC".⁵

4. The Prosecution provided the Defence with the draft Updated DCC on 6 August 2012. The Defence provided the Prosecution with initial observations on 17 August 2012, in which the Defence laid out its arguments as to why certain parts of the Updated DCC should be removed or altered. The Defence's arguments were provided in a chart that ultimately formed the basis for the joint annex filed with the Updated DCC on 24 August 2012 (as filed, the "Joint Annex").⁶ On 21 August 2012, the Defence provided the Prosecution with revised observations and arguments. The Prosecution responded the next day, providing the Defence with proposals on the areas for which it appeared that agreed resolution may be possible. In light of the 24 August 2012 filing deadline,⁷ the Prosecution requested the Defence to send its observations on the proposals, along with any final changes to the Joint Annex, by 16:00 on 23 August 2012. The Defence did not provide additional observations before the filing deadline and requested the Prosecution to put the Defence's earlier observations before the Chamber when filing the Updated DCC.
5. In accordance with the Defence's request, the Prosecution included the Defence's observations and arguments in the Joint Annex filed on 24 August 2012.⁸ The Joint Annex also included the Prosecution's arguments with respect to the areas of disagreement.

⁵ ICC-01/09-02/11-450, para 11.

⁶ ICC-01/09-02/11-468-AnxB.

⁷ While the initial filing deadline was 21 August 2012, the Chamber granted an extensión until 24 August 2012. See ICC-01/09-02/11-467.

⁸ ICC-01/09-02/11-468; ICC-01/09-02/11-468-AnxB.

6. On 11 September 2012 and without seeking prior leave, the Defence filed the Defence Submission, in which it expands on the arguments contained in the Joint Annex and asserts new arguments not contained in the Joint Annex.

Submissions

7. The Prosecution has two submissions: that the Defence Submission should be stricken from the record of the case and disregarded by the Chamber, and in the alternative, that the Prosecution should be granted leave to reply if the Defence Submission is not stricken.
8. *First*, the Prosecution submits that the Chamber should exercise its powers under Article 64(6)(f) of the Statute, Rule 134(3) of the Rules, and Regulations 35 of the Regulations and strike the Defence Submission from the record of the case and refuse to consider the submissions therein. This relief is warranted for the following reasons.
9. While the Defence Submission is styled as a “response” to the Updated DCC, it is an effort to expand and bolster the Defence arguments contained in the Joint Annex.⁹ Even assuming, for the sake of argument, that it is ordinarily permissible under the Rules and Regulations for a party to “reply” to a jointly submitted document,¹⁰ the Defence Submission in this instance is improper. The Chamber’s Order envisaged that the parties’ positions on the disputed issues would be raised in the Joint Annex.¹¹ The Defence, however, chose to wait two-and-a-half weeks past the Chamber’s filing deadline before fully articulating its arguments. This approach circumvents the Chamber’s Order and is contrary to Regulation 35, which requires

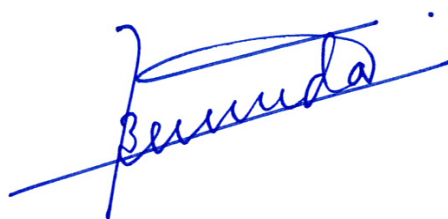
⁹ See arguments contained in the body of the Defence Submission, as well as ICC-01/09-02/11-481-Conf-AnxB (expanding on arguments contained in the 24 August 2012 Joint Annex on an item-by-item basis).

¹⁰ See Regulation 24(1).

¹¹ ICC-01/09-02/11-450, para 11.

that extensions of time are to be granted by the Chamber, not unilaterally declared by a party. To ensure compliance with Regulation 35 and the Order, the Chamber should strike the Defence Submission from the record of the case and disregard the arguments therein when considering the disputes on the Updated DCC.

10. *Second*, and in the alternative, if the Defence Submission is not stricken, the Chamber should grant the Prosecution leave to reply within a reasonable period pursuant to Regulation 24(5). Permitting a reply will go some way to mitigating any unfair disadvantage caused by the improper filing of the Defence Submission. It will enable the Prosecution to provide its observations on the Defence's new and expanded arguments, which is particularly important in relation to arguments that could not reasonably have been foreseen when the Joint Annex was filed, such as the novel suggestion that certain matters should be referred to the Pre-Trial Chamber so that the Pre-Trial Chamber can "clarify" aspects of its Confirmation Decision.¹²
11. For the foregoing reasons, the Prosecution respectfully requests that the Chamber strike and disregard the Defence Submission, or, in the alternative, grant leave to reply to the Defence Submission, pursuant to Regulation 24(5).



Fatou Bensouda,
Prosecutor

Dated this 17th day of September 2012
At The Hague, The Netherlands

¹² ICC-01/09-02/11-481-Conf, para 12.