

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 16 January 2014

TRIAL CHAMBER V(A)

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

Confidential

Prosecution request for leave to reply to the RUTO Defence's 8 January 2014 and the SANG Defence's 8 January 2014 response to the Prosecution's request under Article 64(6)(b) and Article 93 to summon witnesses and variation of time limits under Regulation 35(2)

Source: The 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

Ms. Fatou Bensouda

Mr. James Stewart

Mr. Anton Steynberg

Counsel for William Samoei Ruto

Mr. Karim Khan QC

Mr. David Hooper QC

Ms. Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr. Joseph Kipchumba Kigen-Katwa

Ms. Caroline Buisman

Legal Representatives of Victims

Mr. Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Mr. Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Pursuant to Regulations 24(5) and 34(c) of the Regulations of the Court, the Prosecution requests leave to file a consolidated reply to the RUTO Defence's "Defence response to the corrected and amended version of 'Prosecution's request under Article 64(6)(b) and Article 93 to summon witnesses'" filed on 8 January 2014"¹ and the SANG Defence's "Sang Defence Response to the Prosecution's Request under Article 64(6) and Article 93 to Summon Witnesses"² filed on 10 January 2014, (together the "Defence Responses").
2. Good cause exists to grant the Prosecution's request since the Defence Responses raise new and distinct issues of law and fact that exceed the reach of the Prosecution's original application.³ The Defence Responses further misrepresent important facts, the correction of which will benefit the Chamber prior to issuing its ruling.⁴

Confidentiality

3. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Prosecution requests that this application be classified as "confidential", since it contains information related to a filing so designated.⁵ The Prosecution has no objection to this document being reclassified as "public" once public redacted versions of the Defence Responses are filed.

The Law

4. A party must show "good cause" in order for a Chamber to grant leave to reply.⁶ This Court has held that "good cause" exists when new and distinct

¹ ICC-01/09-01/11-1136-Conf-Red.

² ICC-01/09-01/11-1138-Conf.

³ ICC-01/09-01/11-1120-Red2-Corr.

⁴ ICC-02/05-03/09-294-Red, para. 6(iv).

⁵ Regulation 23*bis*(2) of the Regulations of the Court.

⁶ See, e.g., ICC-01/05-01/08-294, para. 3.

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 This Chamber has granted leave to reply in the context of the previous litigation on cooperation.¹¹

Submissions

5. The Prosecution requests leave to reply to the following legal submissions advanced in the Defence Responses:

(i) that Article 93(1)(e) is “the exclusive provision when dealing with the very specific issue of witness appearance”¹² and that due to the phrase “‘[a]ny other type of assistance’”¹³ under Article 93(1)(l) any other requested form of assistance with respect to witness testimony is therefore foreclosed;¹⁴

(ii) that notwithstanding the fact that Article 93(1)(l) and Article 64(6)(b) may create an international obligation of persons to appear before the Court, “*States are under no duty to enforce that obligation*”;¹⁵

(iii) that Article 93(1)(l) excludes an interpretation that would allow for different outcomes from different States Parties depending on the provisions of their national laws;¹⁶

⁷ ICC-01/04-01/10-61, pp. 3-4.

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

¹¹ ICC-01/09-02/11-746.

¹² ICC-01/09-01/11-1138-Conf, para. 59.

¹³ ICC-01/09-01/11-1136-Conf-Red, para. 8.

¹⁴ ICC-01/09-01/11-1136-Conf-Red, para. 8.

¹⁵ ICC-01/09-01/11-1136-Conf-Red, paras. 19-21.

¹⁶ ICC-01/09-01/11-1136-Conf-Red, para 26; ICC-01/09-01/11-1138-Conf, para. 57.

(iv) that Rule 193 of the Rules, which expressly grants the Court authority to compel the appearance of any person sentenced by the Court, “derogates explicitly from the *Statute*” and is *ultra vires*;¹⁷

(v) that the Prosecution’s decision to neither challenge the *obiter dictum* of the Presiding Judge in the *Lubanga* case that “[t]he Chamber has no power to compel the attendance of witnesses”, nor make a similar witness summons application on that occasion, amounts to an admission by the Prosecution that the Court is unable to issue a witness summons, or otherwise deprives it of the ability to make the present application;¹⁸

(vi) that the Prosecution’s request for a witness summons amounts to a “back-door attempt . . . to bring Article 70 allegations against the accused or others into the main trial”;¹⁹

(vii) that there are several pre-conditions that must be satisfied before the Court can issue a witness summons;²⁰ and

(viii) that the Government of Kenya should be invited to provide its observations in respect of the Prosecution’s Request.²¹

6. The Prosecution further requests leave to reply in order to correct the following misstated facts by the Defence:

(i) the assertion that witnesses P-0015 and P-0016 had not opted to leave their protection locations and return to their original homes;²² and

¹⁷ ICC-01/09-01/11-1138-Conf, para. 25.

¹⁸ ICC-01/09-01/11-1138-Conf, para. 20.

¹⁹ ICC-01/09-01/11-1138-Conf, para. 96.

²⁰ ICC-01/09-01/11-1138-Conf, paras. 78-82.

²¹ ICC-01/09-01/11-1138-Conf, paras. 3-5.

²² ICC-01/09-01/11-1136-Conf-Red, para. 31.

(ii) the assertion that the Prosecution's own investigations indicate that witness P-0015 was not kidnapped and forced at gunpoint to sign an affidavit recanting his statements and withdrawing as a witness.²³

7. Good cause exists to grant leave to reply on each of the above issues:
8. *First*, they are “new and distinct issues” of law and fact that go beyond those addressed in the Prosecution’s adjournment request.²⁴ Given the importance for the relief sought in the original application and its impact on the Prosecution’s continuing ability to present its case, it is appropriate and fair that the Prosecution has the opportunity to address these new arguments before the Chamber rules.
9. *Second*, the Prosecution seeks to reply to the Defence’s suggestion that the Chamber invites observations from the Government of Kenya, prior to even issuing the summonses or seeking their assistance in serving and enforcing them, both since this is a new and distinct issue raised for the first time in the SANG Defence’s response and given its potential impact on the proceedings.
10. *Third*, “the Chamber may benefit from receiving further observations”²⁵ on the issues set out above, since they concern matters of statutory interpretation and unsettled law, the resolution of which may have an impact not only on this case, but on future cases before this Court.
11. *Fourth*, proper disposition of this matter requires that the Chamber has the benefit of considering the correct factual record prior to its ruling. The Prosecution seeks to correct and clearly establish the factual record before the Chamber.

²³ ICC-01/09-01/11-1136-Conf-Red, para. 33.

²⁴ ICC-01/04-01/10-61, p. 3.

²⁵ ICC-01/09-02/11-679, para. 9.

Variation of time limits under Regulation 35(2)

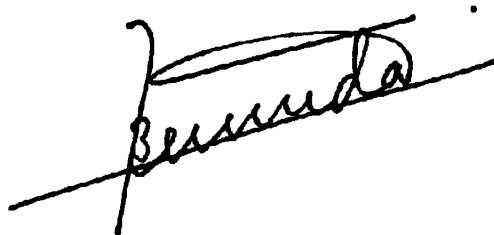
12. In terms of Regulation 34(3), subject to leave being granted by the Chamber, the Prosecution's file is due by 16:00 on Monday 20 January 2014. Given the novel and complex issues involved, the extended length of the SANG Response,²⁶ and the desirability of filing a consolidated response in the interests of judicial economy, it was not possible for the Prosecution to file this request earlier than 16 January 2014. A courtesy copy was provided to all parties immediately after filing.
13. In these circumstances, the Prosecution submits that there is good cause to shorten the time limit for the Defence response, if any, to this request until 12:00 on Friday 18 January 2014 so as to enable the Chamber to render its decision in time to permit the Prosecution to file within the deadline.
14. In the event that the leave is granted and the decision is notified at or before 12:00 on Monday 20 January, the Prosecution undertakes to file within the prescribed deadline. However, in the event that the Chamber is unable to issue its ruling by this time, the Prosecution respectfully requests that the time limit for filing the Reply be extended until 12:00 on the next working day following the notification of the Chamber's decision.

Relief Requested

15. For the foregoing reasons, the Prosecution respectfully requests the Chamber to:
- (i) grant leave to reply to the Defence Responses under Regulations 24(5) and 34(c) of the Regulations of the Court; and

²⁶ Pursuant to the leave of the Chamber, ICC-01/09-01/11-1134.

- (ii) Vary the time limits for any Defence responses to this request and for the filing of the reply as detailed in paragraph 14 above.

A handwritten signature in black ink, appearing to read 'Bensouda', is written over a horizontal line.

Fatou Bensouda, Prosecutor

Dated this 16th day of January, 2014
At The Hague, The Netherlands