



Original: English

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

Date: 2 June 2016

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

Public

Decision on the Ruto Counsel's Request to appoint an *Amicus* Prosecutor

Decision 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
Mr David Hooper
Mr Essa Faal
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

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

The Presidency
President of the Pre-Trial Division

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’) having regard to Article 64 of the Statute, renders this **Decision on the Ruto Counsel’s Request to appoint an *Amicus* Prosecutor**

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 5 April 2016, the Chamber, by majority, decided as follows in the case of

Prosecutor v Ruto and Sang:

1. The charges against the accused are vacated and the accused discharged without prejudice to their prosecution afresh in future.¹

2. On 2 May 2016, counsel for Mr Ruto (the ‘Ruto Counsel’), requested the Chamber to order the Office of the Prosecutor (‘the OTP’) to:

- (i) appoint an *amicus* prosecutor, reporting to the Prosecutor and Deputy Prosecutor and separated by “Chinese walls” from any OTP staff member with any connection to the original trial proceedings in this case, to receive and investigate information obtained by the Defence during the course of its investigations and other information in the trial record and in the OTP’s possession, which provides reason to believe that several OTP witnesses and/or ICC staff members may have committed offences under Article 70; and (ii) update the Trial Chamber and the Defence about the steps which have been taken in regard to the investigation of the alleged commission of Article 70 offences and to advise whether or not the *amicus* prosecutor intends to initiate criminal proceedings against any or all of the individuals at issue.²

3. Alternatively, the Ruto Counsel requested the Chamber to submit the case to the competent State Party, pursuant to Article 70(4) of the Statute and Rule 162(4) of the Rules.³

4. On 10 May 2016, the Legal Representative for Victims submitted a response, opposing the request.⁴

¹ Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red, page 6.

² Ruto Defence request to appoint an *amicus* prosecutor, ICC-01/09-01/11-2028-Red, para 44.

³ ICC-01/09-01/11-2028-Red, para. 45.

⁴ Response of the Common Legal Representative for Victims to the ‘Ruto Defence Request to Appoint an *Amicus* Prosecutor’, ICC-01/09-01/11-2029-Conf.

5. On 18 May 2016, counsel for Mr Sang (the ‘Sang Counsel’) and the OTP filed their responses.⁵ While the Sang Counsel support the request, the OTP submits it should be rejected.
6. On 26 May 2016, the Ruto Counsel filed a request for leave to reply to the OTP’s response.⁶

II. ANALYSIS

7. As noted above, the Chamber, by majority, has vacated all the charges and discharged both accused, without prejudice to their prosecution afresh in the future.⁷
8. Notably, the decision of 5 April 2016 was made final, as it was not appealed by any of the parties. In this connection, the Chamber recalls the wisdom of the maxim that litigation must come to a conclusion at some point. That point was when the period of appeal elapsed without an appeal.
9. Accordingly, the Chamber’s majority decision of 5 April 2016 effectively terminated all trial proceedings against the accused. The ‘case’ of the *Prosecutor v Mr William Samoei Ruto and Mr Joshua Arap Sang* (case ICC-01/09-01/11) before Trial Chamber V(A) was therefore concluded by the decision of 5 April 2016, for all intents and purposes.
10. In the circumstances, the Chamber considers it inappropriate to exercise jurisdiction on the merits of the application made by the Ruto Counsel.

⁵ Sang Counsel Response to ‘Ruto defence request to appoint an *amicus* prosecutor’, ICC-01/09-01/11-2030; OTP’s response to the requests to appoint an *amicus* prosecutor, ICC-01/09-01/11-2031-Red.

⁶ Ruto Counsel Application for Leave to Reply to “Prosecution’s response to the Defence requests to appoint an *amicus* prosecutor”, ICC-01/09-01/11-2032.

⁷ ICC-01/09-01/11-2027-Red, page 6.

11. As the Ruto Counsel's application aims to initiate an investigation against certain targets, the proper forum for the applicants to bring their complaint would be the Pre-Trial Division.

12. As a final observation, the Chamber notes the evident acrimony that permeated the parties' submissions. As the record of the trial proceedings in the *Prosecutor v Ruto and Sang* case shows, this Chamber has consistently discouraged such attitude on the part of counsel appearing before it.⁸ The Chamber thus reminds counsel that the dictates of professional responsibility require counsel to maintain detachment at all times from the case they are litigating.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

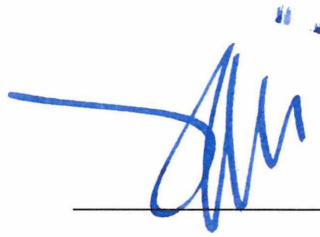
REJECTS the request of the Ruto Defence, and

DECLARES the Ruto Counsel Application for Leave to Reply to "Prosecution's response to the Defence requests to appoint an *amicus* prosecutor", ICC-01/09-01/11-2032 moot.

Judge Eboe-Osuji appends a separate further opinion.

⁸ For example, transcript of hearing of Monday 19 August 2013, ICC-01/09-01/11-T-24-CONF-ENG CT, at p. 87. See also 'Decision on the Sang Defence Application to Lift B.3 Redactions and for Additional Disclosure', 7 July 2014, ICC-01/09-01/11-1421-Conf, at para. 27. 'Decision on the Ruto Defence's Request for Sanctions', 9 January 2015, ICC-01/09-01/11-1773-Conf, at paras 24 and 25.

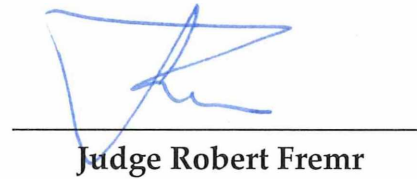
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 2 June 2016

At The Hague, The Netherlands