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No.: ICC-01/09-01/11
Date: **26 February 2013**

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. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG**

Public

With Confidential *Ex Parte* Annex A – Only available to the Prosecution

**Prosecution's response to joint Defence request for communication of 22 documents
under Rule 77**

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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For Joshua Arap Sang:

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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**Victims Participation and Reparations
Section**

Others

1. Pursuant to the order of Trial Chamber V (“the Chamber”),¹ the Prosecution hereby responds to the Defence request seeking disclosure of 22 items on the basis of Rule 77 of the Rules of Procedure and Evidence.
2. As explained below, some of the requested items have already been disclosed to the Defence under the same or different identification numbers (ERN). Further, the Prosecution agrees - out of courtesy - to disclose additional documents requested by the Defence notwithstanding that they are not apparently relevant to the preparation of the Defence. However, the Prosecution opposes the disclosure of eight items for the reasons set out below.

Background

3. Pursuant to the Chamber’s decision “on the schedule leading up to trial”,² the Prosecution filed its list of evidence (“LOE”) to be relied upon at trial on 9 January 2013.³
4. Twenty-five items listed on the 9 January 2013 LOE were inadvertently not disclosed in accordance with the deadline set by the Chamber for communication of incriminatory evidence. On 25 January 2013, the Prosecution filed an application requesting the Chamber’s authorisation to disclose only one of these documents, on an exceptional basis (“Application”),⁴ and informed the Chamber and the parties of its intention to remove the other documents from the LOE.
5. On 4 February 2013, the Defence requested the Prosecution *via* e-mail to disclose 22 of the items identified by the Prosecution as appropriate for removal from the LOE.⁵

¹ ICC-01/09-01/11-614.

² ICC-01/09-01/11-440.

³ ICC-01/09-01/11-540-Conf-AnxC.

⁴ ICC-01/09-01/11-570-Conf.

⁵ The Prosecution replied on 19 February 2013 to the e-mail of the Defence.

6. On 11 February 2013, the Defence included the same request into its response to the Prosecution Application.⁶

Submissions

7. Out of the 22 items requested by the Defence, 10 documents have already been disclosed.⁷
8. The Prosecution considers that four of the items requested are not relevant as explained below, however, will proceed to disclose them to the Defence:
- Document KEN-OTP-0080-0063 is the image of a CD-Rom. It has no intrinsic value for the preparation of the Defence.
 - Document KEN-OTP-0003-0015 is a basic map of Kenya. It is of poor quality. The Defence was provided with other more detailed maps that capture the same type of information.⁸
 - Documents KEN-OTP-0026-4598 and KEN-OTP-0026-5051 are video files containing incriminatory material which the Prosecution does not intend to rely on.
9. With respect to the remaining eight documents, the Prosecution assessed that these documents are not relevant to the preparation of the Defence nor do they

⁶ ICC-01/09-01/11-595-Conf.

⁷ KEN-OTP-0027-0254 was disclosed under ERN KEN-OTP-0036-0073 (Pre-Trial INCR package 5, 5 July 2011; Trial INCR package 25, 9 January 2013); KEN-OTP-0027-0275 was disclosed under ERN KEN-OTP-0036-0069 (Pre-Trial INCR package 5, 5 July 2011; Trial INCR package 25, 9 January 2013); KEN-OTP-0028-0095 is a transcribed translation of a portion of audio document KEN-OTP-0027-0214. That transcribed translation is contained in document KEN-OTP-0048-0003 disclosed as incriminatory on 30 January 2013 (Trial INCR package 29).

Documents KEN-OTP-0033-0037, KEN-OTP-0065-0105 and KEN-OTP-0065-0108 are duplicates respectively of KEN-OTP-0041-0182, KEN-OTP-0066-1726 and KEN-OTP-0066-1747 which are also requested by the Defence. The Prosecution disclosed KEN-OTP-0041-0182, KEN-OTP-0066-1726 and KEN-OTP-0066-1747 on 22 February 2013 (Trial Rule 77 package 24).

Document KEN-OTP-0088-0686 requested by the Defence is actually document KEN-OTP-0088-0586 (entry 1513 of the LOE) which was disclosed as part of Trial INCR package 19, 21 December 2012. That document was mentioned twice in the LOE, under its correct ERN number and the incorrect one. The Prosecution removed the incorrect reference KEN-OTP-0088-0686.

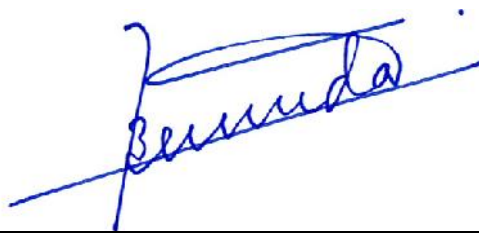
⁸ KEN-OTP-0033-0002 and KEN-OTP-0033-0003.

contain potentially exculpatory information.⁹ Therefore, their disclosure is not required. The fact that these documents were at one moment listed in the LOE does not necessarily imply that they are material to the preparation of the Defence within the meaning of Rule 77. Additionally, the individual who provided them does not consent to disclosure.

- Documents KEN-OTP-0027-0251, KEN-OTP-0027-0253, KEN-OTP-0027-0257, KEN-OTP-0027-0264, KEN-OTP-0027-0266 and KEN-OTP-0027-0274 are copies of e-mails that were provided by an individual who does not consent to disclosure. Additionally, these emails are of no utility for the preparation of the Defence.
- Documents KEN-OTP-0027-0265 and KEN-OTP-0027-0267 are purely incriminatory with no apparent relevance to the Defence. They were similarly provided by an individual who does not consent to disclosure.¹⁰

Conclusion

10. For the foregoing reasons, the Prosecution has provided or agrees to provide 14 items, but opposes the Defence request in relation to the eight documents listed in paragraph 9.



Fatou Bensouda, Prosecutor

Dated this 26th day of February 2013
At The Hague, The Netherlands

⁹ The Prosecution continues to assess the relevance of the evidence in its possession on an on-going basis in light of the progress and development of the case. Should circumstances change, the Prosecution may reconsider its position. If the Chamber deems it necessary, the Prosecution is ready to provide the requested documents for the Chamber's assessment.

¹⁰ Additional explanation is provided in a confidential *ex parte* Annex appended to this filing. It is classified as confidential *ex parte* since it contains confidential information pertaining to security of witnesses and the confidentiality of an on-going investigation.