



Original: English

No.: ICC-01/09-01/11
Date: 10 September 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***

PUBLIC

**Public redacted version of
“Prosecution’s Reply to the “Defence Response to Corrected version of
‘Prosecution’s eighth application pursuant to Regulation 35(2) of the Regulations
of the Court’”, 21 August 2014, ICC-01/09-01/11-1463””**

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 the Defence

For William Samoei Ruto:

Mr Karim Khan
Mr David Hooper
Ms Shyamala Alagendra

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 Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. With the leave of the Chamber, the Prosecution files its reply to the “Defence Response to Corrected version of ‘Prosecution’s eighth application pursuant to Regulation 35(2) of the Regulations of the Court’, 21 August 2014, ICC-01/09-01/11-1463” (“Ruto Defence Response”).¹

Confidentiality

2. The Prosecution files this Request as Confidential as it relates to previous filings similarly classified.

Statement of facts

3. On 22 August 2014, the Prosecution filed its eighth application pursuant to Regulation 35(2) of the Regulations of the Court wherein it requested to add 57 items to its List of Evidence (“Application”).²
4. The Defence for Mr Ruto filed a response on 26 August.³
5. The Defence for Mr Sang did not file a response by the Chamber’s deadline of noon on 27 August 2014. However, a response was subsequently filed at 15:47 and notified at 16:30. At the time of filing this Reply, no request for a variation of the Chamber’s deadline has been notified.
6. Also on 27 August, the Prosecution filed its request to reply to the “Defence Response to Corrected version of ‘Prosecution’s eighth application pursuant to Regulation 35(2) of the Regulations of the Court’, 21 August 2014, ICC-01/09-01/11-1463” (“Request”).
7. At 17:36 on 27 August, the Chamber notified the parties by way of email that the Prosecution’s Request had been granted.

¹ ICC-01/09-01/11-1466-Conf.

² ICC-01/09-01/11-1463-Conf.

³ Ruto Defence Response.

Submissions

Mischaracterisation of the Prosecution's grounds for relief

8. The Prosecution requested permission to add 57 items of evidence⁴ to its List of Evidence for three main purposes: "(a) to prove that P-0604 and P-0495 [REDACTED] recanted their prior statements and/or withdrew their cooperation with the Prosecution; (b) to prove [REDACTED] a wider witness interference scheme in which *other* Prosecution witnesses have been approached; and (c) to assist the Chamber with its overall assessment of evidence and determining matters related to alleged witness corruption."⁵
9. Additionally, the Prosecution advised that it foresaw the possibility of using the evidence to confront the witnesses, should they prove to be adverse to the Prosecution and/or to support any application it may make subject to Rule 68(2)(d)(i).⁶
10. It is clear from the above that nowhere in the request does the Prosecution seek to rely on the relevant evidence to establish consciousness of guilt on the part of Mr Ruto, as the Ruto Defence Response suggests.⁷
11. Notwithstanding this, however, the second main purpose relied on by the Prosecution⁸ is mischaracterised in the Ruto Defence Response as "an unacceptable *volte face* in the Prosecution's position regarding consciousness of guilt".⁹ Leaving aside the question of whether an undertaking may justifiably be reconsidered in the light of significant and unanticipated changes in circumstances,¹⁰ the Ruto Defence complaint is moot. The Prosecution has not sought to introduce the evidence to establish *mens rea* on the part of Mr Ruto.

⁴ As listed in ICC-01/09-01/11-1463-Conf-Exp-AnxA and ICC-01/09-01/11-1463-Conf-Exp-AnxB.

⁵ Application, para.3.

⁶ *Ibid.*

⁷ Ruto Defence Response, para.3.

⁸ *Ie.* "(b) to prove that their interference was part of a wider witness interference scheme in which *other* Prosecution witnesses have been approached."

⁹ Ruto Defence Response, para.10, under the heading "Allegations of a 'wider witness interference' scheme have no place in the main case."

¹⁰ The Prosecution expresses no views on this issue for present purposes.

Rather, this purpose is aimed at obtaining evidence from the relevant witnesses regarding attempts to improperly or corruptly influence *other* witnesses. This evidence, in turn, may be used to challenge the other witnesses concerned should they transpire to be adverse to the Prosecution,¹¹ and/or to support any subsequent request to admit prior recorded testimony under Rule 68(1)(d). Given that the evidence of interference with many of the Prosecution witnesses is mutually corroborative, it is important that the Chamber has access to the broader picture, rather than limiting itself to a piecemeal adjudication of individual instances of witness interference.

12. Additionally, the Application argues that evidence of witness interference is relevant to the Chamber's determination of the credibility of Prosecution witnesses, which the Defence has specifically placed in issue. Again, this has nothing to do with Mr Ruto's *mens rea*. Again, it is important that the Chamber has access to the broader picture.

Clarification of disclosure of the relevant evidence

13. The assertion that "[t]he reality is that "the bulk of the materials" were disclosed for the first time in the past 2 weeks,"¹² which the Ruto Defence makes in its Response is both exaggerated and misleading. The Prosecution concedes that two of the 57 items were *not* disclosed on 21 August 2014 due to human error, as rightly pointed out in the Ruto Defence Response,¹³ however the Prosecution promptly forwarded courtesy copies of those documents to both Defence teams as soon as the Defence for Mr Sang pointed out this oversight.¹⁴ These two items are [REDACTED] a mobile telephone attributed to [REDACTED] and consist of a total of two pages.¹⁵

¹¹ Which the Ruto Defence does not suggest is improper: see Ruto Defence Response, footnote 15.

¹² Ruto Defence Response, para.19 and footnote 45.

¹³ Ruto Defence Response, para.19 and footnote 43.

¹⁴ The Defence for Mr Sang sent the Prosecution an email on Sunday 24 August at 17:23 alerting the Prosecution to the fact that it had not disclosed [REDACTED] and courtesy copies were sent to both Defence teams by email on 25 August 2014 at 10:15. The Prosecution did not intend to mislead the Chamber in its

14. The Defence goes to great lengths to point out the items which were disclosed for the first time in August 2014.¹⁶ The Prosecution provides in annex a table of the disclosures of the documents in its Application,¹⁷ which negates the assertion that the “bulk” of materials were first disclosed in August 2014. The documents that the Application seeks to add number a total of 280 pages. The 27 items the Defence lists in footnotes 43 and 45 of its Response as being disclosed for the first time in August 2014¹⁸ number 45 pages. 13 of those items are one-page [REDACTED] telephones.¹⁹ Eight of those items are Investigator’s Reports numbering 12 pages in total,²⁰ with six of those eight being only a few lines in length.²¹ Two of the items are the affidavit and covering email received with respect to P-0604 on 11 August 2014, and disclosed on 13 August 2014, and which are seven pages combined.²² One item is a transcript of a conversation between the Prosecution and P-0604 from 31 July 2014, numbering 10 pages.²³ One item is a one-page [REDACTED] pertaining to P-0604,²⁴ one item is a [REDACTED] pertaining to P-0495²⁵ and one item is [REDACTED].²⁶
15. The Prosecution submits that, not only does 45 out of 280 pages fail to constitute “bulk” in volume, but the 27 items identified by the Ruto Defence are straightforward and easily digested by a team of Defence lawyers. The 13 [REDACTED] telephones are annexes to statements provided by [REDACTED]. They are simply illustrative of information which is already contained in these

Application as at the time of filing, it believed that those items had been disclosed on 21 August, when in fact – mistakenly – they hadn’t.

¹⁵ KEN-OTP-0115-0237 and KEN-OTP-0115-0239.

¹⁶ Ruto Defence Response, footnote 45.

¹⁷ Annex A.

¹⁸ In footnote 45, the Defence have included a document which does not appear in Annexes A or B of the Prosecution’s Application, being [REDACTED]. The Prosecution assumes that the Defence meant to list [REDACTED], which the Prosecution disclosed for the first time on 21 August 2014 and included in Annex A of its Application. The Prosecution notes that this ERN *did* appear erroneously in its Application at footnote 23.

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

statements – statements which were both disclosed to the Defence on 25 April 2014.²⁷ The Investigator's Reports are short and convey contacts between the Prosecution and P-0604, [REDACTED].

16. The [REDACTED] are all administrative in nature and do not bring to light any new information which was not already in the possession of the Defence. The identity of P-0604 was disclosed to the Defence on 9 September 2013 and [REDACTED].²⁸ [REDACTED].²⁹ The Prosecution submits that receiving this underlying documentation two weeks before the scheduled testimony of P-0604 does not unfairly burden the Defence.
17. For three items, it was impossible for the Prosecution to disclose these to the Defence any earlier than it did. The affidavit and cover email were only received by the Prosecution two days before they were disclosed. The transcribed telephone conversation took place less than two weeks prior to it being disclosed, which was time required for the transcription of the call to be completed.
18. The Prosecution requests the Chamber to consider the abovementioned facts and figures and those listed in Annex A in considering the weight to be given to the Ruto Defence's submissions – which the Prosecution submits are clearly exaggerated – when assessing whether the relief sought in the Prosecution's Application would cause unfair prejudice to the Defence.

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

Conclusion

19. The Prosecution requests the Chamber to consider these extra submissions when determining the Prosecution's eighth Application pursuant to Regulation 35(2) of the Regulations of the Court.



Fatou Bensouda,
Prosecutor

Dated this 10th day of September 2014
At The Hague, The Netherlands