

**Cour
Pénale
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**International
Criminal
Court**

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No.: ICC-01/09-01/11
Date: 11 September 2014

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
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 “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-Conf”**

Sources: Defence for Mr. William Samoei Ruto

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. The defence for Mr. William Samoei Ruto ("Defence") opposes in part the Prosecution's request in the *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-Conf ("Application")¹ to add 57 documents to its List of Evidence ("Documents") for the purposes of: (i) confronting P-0604 and P-0495 with this material if the witnesses are adverse; and (ii) using this material with P-0604 and P-0495 to place before the Trial Chamber information concerning a "wider witness interference scheme".²
2. The Defence does not object to the Prosecution being permitted to add the Documents to its List of Evidence ("LoE") for the sole purpose of confronting a witness who is not prepared to speak the truth and is declared hostile. However, any attempt by the Prosecution to divert attention away from the proper focus of its main case – the allegations of post-election violence in Kenya in 2007/08 ("PEV") – should be rejected. The Prosecution's proposal that it be permitted to introduce allegations of a wider witness interference scheme into the record is improper and of serious concern, particularly when it: (i) [REDACTED],³ and (ii) appears that the present application is intended as a gateway application with "a similar application [being submitted] in respect of the remaining [seven] summonsed witnesses at the earliest opportunity".⁴
3. The Prosecution's proposal is not only prejudicial to Mr. Ruto's fair trial rights in the main case but also to the jurisdiction of the Pre-Trial Chamber in respect of any future case concerning the Article 70 allegations referred to in the Application. Separate to the limited credibility assessment of a hostile witness, this Trial Chamber should not be asked to adjudicate allegations completely

¹ ICC-01/09-01/11-1463-Conf-Corr.

² Application, paras. 2, 3, 28, 31, 32, 33, 36, 37 and 38.

³ ICC-01/09-01/11-T-23-CONF-ENG ET, p. 39, lines 18-20.

⁴ Application, fn. 3.

peripheral to the question of responsibility for the PEV prior to the consideration of the same facts by a Pre-Trial Chamber. Such a course risks upsetting the careful balance established in the Court's legal framework regarding the division of responsibility between the Pre-Trial Chambers and Trial Chambers.

4. The timing and tenor of the Application also raise serious concerns. Both P-0604 and P-0495 are the subject of a summons; a fact that should have caused the Prosecution to have sufficient concern to file the Application earlier, if it was viewed as having any merit. Yet, despite seeking a summons for P-0495 in early December 2013⁵ and a summons for P-0604 in June 2014,⁶ the Prosecution filed the Application just over a week before the start of the next trial session.⁷ P-0604 and P-0495 are scheduled to be the first and second witnesses to appear in that session.⁸ There is no excuse for not filing the Application earlier.⁹ The Chamber has already ruled where the balance lies when weighing Mr. Ruto's fair trial rights against [REDACTED].¹⁰ Therefore, the fact that the Prosecution did not provide the Defence with earlier notice of the Application and full disclosure of all relevant material on a rolling basis is to be strongly deprecated.

5. The tenor of the Application is also to be criticised and raises questions about the fair and professional balance which should be displayed in filings by the Prosecutor of the ICC. [REDACTED]¹¹ [REDACTED].¹² [REDACTED].¹³

⁵ Corrected and Amended version of "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses" (ICC-01/09-01/11-1120-Conf-Exp), 5 December 2013, ICC-01/09-01/11-1120-Conf-Red-Corr2. In fact, the Prosecution expressly acknowledges that P-0495 "has not indicated any willingness to attend the trial voluntarily" "since June 2013" (Application, para. 35).

⁶ Confidential redacted version of 'Prosecution's second supplementary request to summon a witness', 9 June 2014, ICC-01/09-01/11-1349-Conf-Red.

⁷ The fact the Prosecution sought a summons for P-0604 combined with P-0604's unreliable record at maintaining his commitments to the Prosecution undermine the Prosecution's assertion that it "did not know until 11 August that P-0604 would potentially be adverse" (Application, para. 25).

⁸ ICC-01/09-01/11-1439-Conf, para. 6.

⁹ *Contra* Application, para. 26.

¹⁰ [REDACTED]

¹¹ Application, para. 3. [REDACTED].

¹² [REDACTED]

¹³ Rome Statute ("Statute"), Article 66.

II. Submissions

No opposition to Prosecution using Documents to confront a hostile witness

6. The Defence does not oppose the addition of the Documents to the LoE for the sole purpose of confronting P-0604 and P-0495 in Court with this material¹⁴ should either or both witnesses recant their prior statements and be declared hostile by the Chamber after hearing full argument.¹⁵ In such event, the Prosecution should be entitled to test the witnesses' credibility and to put to them their "prior conflicting accounts [which] they...provided regarding the PEV."¹⁶ The Defence supports the rigorous testing of the Prosecution's case in this instance.

7. The Defence also notes the Prosecution's stated intention to use the Documents "to support any application it may make subject to Rule 68(2)(d)(i)."¹⁷ In this regard, it is assumed the Prosecution is following the Trial Chamber's direction that, if it "intends to rely on additional evidence that forms part of Article 70 allegations...it must disclose this material, and apply to the Chamber to add it to the LoE."¹⁸ Separate to the substantive arguments which the Defence will make at the appropriate time in response to any Rule 68 application, the Defence again does not object to the Prosecution using the Documents for this limited purpose.

8. But, as argued more fully below, any attempt by the Prosecution to use any of the Documents to lead evidence from either witness for any other purpose is opposed.

¹⁴ Application, paras. 3(a).

¹⁵ The Defence submits that in these proceedings, where a party calling a witness intends to impeach his or her credibility, the leave of the Trial Chamber should be sought and, only if leave is granted, should the witness be declared hostile and the calling party be permitted to cross-examine the witness. *See, e.g., Prosecutor v. Katanga et al*, Transcript 9 February 2010, ICC-01/04-01/07-T-98-Red-ENG WT, p. 19, line 4 to p. 20, line 19.

¹⁶ Application, para. 3.

¹⁷ Application, para. 3. *See also* paras. 31 and 37.

¹⁸ Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, ICC-01/09-01/11-762 ("Decision on Trial Start Date"), para. 89.

Allegations of a “wider witness interference scheme” have no place in the main case

9. This Trial Chamber has been clear in firmly demarcating the boundaries between the main case and any future “separate case, not...before this Chamber” concerning Article 70 issues.¹⁹ This boundary is particularly important when, as here, the allegations which are being asserted by the Prosecution are not only peripheral to the charges in the main case but have not yet [REDACTED].²⁰ Set in this context, the Defence submits that the Prosecution’s proposal that it be permitted to start leading evidence of “a wider witness interference scheme in which *other* Prosecution witnesses have been approached”²¹ is improper, largely irrelevant and highly prejudicial for the following four reasons.

10. *First*, [REDACTED]²² [REDACTED]. [REDACTED]

[REDACTED].²³

11. [REDACTED].²⁴ The Prosecution should not be permitted to change position at this late stage of proceedings. The Defence has relied on the statements made by the Prosecution in clear response to a direct line of questioning on the specific subject of the Prosecution’s intentions vis-à-vis [REDACTED].²⁵ The prejudice to the Defence is clear.

12. *Second*, and notwithstanding the foregoing, the allegations of a wider scheme of witness tampering and corruption are largely irrelevant to the charges in the main case.²⁶ Any relevance such allegations might have is extremely narrow and linked to witness credibility. Caution should be exercised to ensure that this trial

¹⁹ Decision on Trial Start Date, para. 89. *See also* the Trial Chamber’s observations made at the status conference of 15 May 2013 (ICC-01/09-01/11-T-23-CONF-ENG ET, p. 33, lines 9-25).

²⁰ [REDACTED]

²¹ Application, para. 3(b) (emphasis in original).

²² Application, para. 33.

²³ ICC-01/09-01/11-T-23-CONF-ENG ET, p. 39, lines 18-20.

²⁴ [REDACTED]

²⁵ ICC-01/09-01/11-T-23-CONF-ENG ET, p. 34, line 10 to 36, line 9 and p. 40, line 8 to p. 41, line 2.

²⁶ [REDACTED]

does not lose its primary focus and degenerate into a trial about alleged witness corruption. In order to safeguard the trial's proper focus, the Prosecution should not be permitted to lead evidence through P-0604 and P-0495 about allegations of interference concerning [REDACTED] and "other witnesses".²⁷ Such an inquiry clearly exceeds what is necessary to prove the main charges. In addition, the impropriety of the Prosecution's proposed course is underlined by the fact that [REDACTED] has already testified without reference to the material which the Prosecution now wishes to lead from P-0604 and P-0495. Further, [REDACTED] have yet to testify, although it is understood that both witnesses have re-established contact with the Prosecution [REDACTED].²⁸

13. Further, the Defence submits that the Prosecution's arguments which seek to justify the shift in focus are artificial and do not withstand scrutiny. Contrary to the Prosecution's assertion, there are no "competing versions as to who has been corrupting Prosecution witnesses and for what purpose".²⁹ The Defence has not made any allegations about current schemes to interfere with witnesses. Rather, the central tenet of the defence case is the mobilisation of a core group of individuals, primarily PNU supporters,³⁰ in early 2008 by certain government officials such as Mr. Mutea Iringo (then Deputy Permanent Secretary for Internal Security) and the Hon. Martha Karua (then Minister of Justice) to falsely implicate ODM officials including Mr. Ruto in the PEV.³¹ These false witnesses were motivated by the benefits (financial and otherwise) various "witness protection schemes" offered and, thus, agreed to appear before the WAKI Commission, the Kenya National Commission on Human Rights and, ultimately, this Court. This narrative is part of Mr. Ruto's defence against the

²⁷ Application, paras. 31, 32, 36, 37 and 38.

²⁸ [REDACTED]

²⁹ Application, para. 33.

³⁰ The Defence asserts that at least eight witnesses (P-0015, P-0016, P-0019, P-0024, P-0025, P-0028, P-0032, and P-0336) were involved in this scheme.

³¹ See, e.g., ICC-01/09-01/11-T-120-CONF ET, p. 57, line 7 to p. 64, line 13; ICC-01/09-01/11-T-125-CONF ET, p. 74 to p. 78, line 15.

charges in the main case and clearly concerns historic witness manipulation.
[REDACTED].

14. *Third*, [REDACTED].³² [REDACTED].

15. *Fourth*, as noted above, the Prosecution's highly charged allegations that [REDACTED] are untested and still only at the investigation phase. To progress beyond this phase, they will need to go through the confirmation process and be considered by a Pre-Trial Chamber.³³ However, if these untested allegations are now to be made "a central issue in this trial"³⁴ with this Chamber being asked to "determin[e] matters related to alleged witness corruption",³⁵ then the tension which arises between the roles and responsibilities of the Pre-Trial Chamber and this Chamber becomes clear. This tension underlines that the Prosecution's proposed course is improper. Instead, the Trial Chamber should adhere to its previous recognition that the role any allegations about witness interference should play in the main case is strictly limited and a fuller inquiry is only warranted in a separate, spinoff case properly conducted within the Court's established legal framework.

16. In short, the Prosecution's proposal that it be permitted to [REDACTED] and to inject its unconfirmed allegations of a wider scheme of witness interference into the main case will not "assist the Chamber with its overall assessment of evidence"³⁶ and its ultimate determination of responsibility for the PEV. Rather, and as the Prosecution expressly states in the Application, it will embroil the Chamber in "determining matters related to alleged witness corruption".³⁷ As argued above, this is an ill-thought out course, which is highly prejudicial to Mr.

³² [REDACTED]

³³ ICC-01/09-01/11-T-23-CONF-ENG ET, p. 33, lines 14-15 and 21-23.

³⁴ Application, para. 33.

³⁵ Application, para. 3(c). *See also* paras. 28(d), 32 and 38.

³⁶ Application, para. 3(c).

³⁷ Application, para. 3(c).

Ruto and fraught with jurisdictional difficulties. Accordingly, it should be rejected.

Other concerns: timing of the Application; timing and deficiencies in disclosure

17. The Defence's concerns about the timing of the Application have been set out in broad terms above.³⁸ The Defence recognises that one answer to late disclosure is the provision of additional time. However, this is only an answer where it does not prejudice the right to "[t]o be tried without undue delay".³⁹ At this stage of proceedings, further delay to enable the Defence to review material at least a considerable part of which has been in the Prosecution's possession for a significant period of time would be prejudicial to Mr. Ruto's fair trial rights. The exclusion of all or part of the late disclosed evidence as a remedy for the Prosecution's conduct as well as to allay any potential prejudice caused to the accused is another option that the Trial Chamber could consider.⁴⁰
18. Considering: (i) the tardiness of the Application; (ii) [REDACTED]; and (iii) the Prosecution's resistance to Defence efforts to have the previous Article 70 allegations adjudicated as a preliminary issue before trial commenced,⁴¹ the Defence is compelled to question the timing of the Application and whether the Prosecution has acted with the requisite *bona fides*, diligence and professionalism on this issue. The importance of this question may be heightened in the coming days and weeks as it appears that the Defence is about to be deluged with more Article 70 disclosure for all seven remaining summonsed witnesses.⁴² It would be wholly prejudicial for the Defence to be mired now in ancillary litigation in relation to matters it has not investigated, about which it has not been given

³⁸ *Supra*, para. 4.

³⁹ Statute, Article 67(1)(c).

⁴⁰ See, e.g., the view of the Majority in *Prosecutor v. Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728 at para. 121 in respect of late disclosed evidence obtained as a result of extensive post-confirmation investigations.

⁴¹ [REDACTED]

⁴² Application, fn. 3.

complete disclosure, and which is simply peripheral to the core allegations relating to the alleged involvement of Mr. Ruto in the PEV. The Defence submit that the primary focus must remain the veracity or otherwise of the Prosecution's narrative relating to the PEV. Twenty-one Prosecution witnesses have been brought before the Trial Chamber so far for this purpose. In relation to the remaining witnesses, it is submitted that the reliability and truthfulness of their accounts can be tested in the course of their testimony in the usual manner, including by being confronted with evidence, as described above, in the event the Trial Chamber declares any "hostile". It is submitted that such an approach properly balances the rights of the Prosecution and the Defence in a fair and manageable manner and will provide the Chamber with sufficient information upon which to determine credibility and truthfulness of the evidence relevant to the charges.

19. In addition to the above criticisms, the Defence observes that the Application is misleading⁴³ in its statement arguing that "the addition of [the] 57 documents will not cause unfair prejudice to the Accused".⁴⁴ The reality is that "the bulk of the materials" were disclosed for the first time in the past 2 weeks.⁴⁵ In view of the fact that the Application appears to be a gateway application,⁴⁶ the Defence requests disclosure of all Article 70 materials, including lesser redacted versions

⁴³ The Defence also advises that, contrary to the statements at paragraphs 4 and 39 of the Application that all of the Documents had been disclosed by 21 August 2014, 2 of the Documents (KEN-OTP-0115-0237 and KEN-OTP-0115-0239) were not disclosed to the Defence until 25 August 2014. Further, one document remains classified as Rule 77 and had not been redisclosed as incriminatory (*contra* Application, paras. 4, 39).

⁴⁴ Application, para. 4.

⁴⁵ *Contra* Application, para. 4 and fn. 4. The following materials were disclosed for the first time on 12 August 2014: (i) KEN-OTP-0135-0814_R01; and (ii) KEN-OTP-0129-0549_R01. The following materials were disclosed for the first time on 13 August 2014: (i) KEN-OTP-0135-1134; and (ii) KEN-OTP-0135-1135. The following materials were disclosed for the first time on 15 August 2014: (i) KEN-OTP-0117-1029_R01; (ii) KEN-OTP-0117-1030_R01; (iii) KEN-OTP-0117-1031_R01; (iv) KEN-OTP-0117-1032_R01; (v) KEN-OTP-0117-1033; (vi) KEN-OTP-0117-1034; (vii) KEN-OTP-0117-1035_R02; (viii) KEN-OTP-0117-1036_R01; (ix) KEN-OTP-0117-1037; (x) KEN-OTP-0117-1038; (xi) KEN-OTP-0117-1039_R01; (xii) KEN-OTP-0138-0028_R01; (xiii) KEN-OTP-0138-0036_R01. The following materials were disclosed for the first time on 21 August 2014: (i) KEN-OTP-0117-1028; (ii) KEN-OTP-0117-1040_R01; (iii) KEN-OTP-0138-0497 (iv) KEN-OTP-0138-0498; (v) KEN-OTP-0138-0499; (vi) KEN-OTP-0138-0501_R01; (vii) KEN-OTP-0138-0507 and (viii) KEN-OTP-0114-0467_R01.

⁴⁶ Application, fn. 3.

of material already disclosed, relating to all remaining summonsed witnesses as soon as possible.

V. Classification

20. This response is filed confidentially pursuant to Regulation 23*bis*(2) of the Regulations of the Court.

VI. Requested Relief

21. For the reasons set out above, the Defence:

- (i) does not object to the Prosecution being permitted to add the Documents to its LoE for the sole purpose of confronting a witness who is not prepared to speak the truth and is declared hostile by the Chamber after hearing full argument; and
- (ii) opposes the Prosecution's request to use the Documents for any other purpose.

Respectfully submitted,



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Lead Counsel for Mr. William Samoei Ruto

Dated this 11th Day of September 2014
At The Hague, Netherlands