

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 October 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***

Confidential

**Sang Defence Response to Prosecution's Eleventh Application pursuant to
Regulation 35(2) of the Regulations of the Court**

Source: Defence for Mr. Joshua arap Sang

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

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Other

I. INTRODUCTION

1. On 15 October 2014, the Prosecution filed its '*Eleventh Application pursuant to Regulation 35(2) of the Regulations of the Court*',¹ wherein it seeks to add an additional 539 items to its List of Evidence ("LOE") in relation to witnesses P-15, P-16, P-19, P-28, P-336, P-397 and P-524. The Prosecution applies pursuant to Regulation 35(2) of the Regulations of the Court, and Articles 64(6)(d) and 69(3) of the Rome Statute. The requested materials are listed in Confidential Annex N to the Eleventh Application; the materials include, *inter alia*, investigators' reports, lesser-redacted transcripts of interviews, audio files and materials received from the witnesses.
2. The Prosecution states that these materials are necessary for the Trial Chamber's ultimate determination of the truth, and that these materials are relevant to: (a) to the issue of the witnesses' credibility and the reason for their withdrawal of cooperation and/or recantation; (b) for the purposes of cross-examination if the witnesses are adverse; (c) for corroboratory purposes with respect to other witnesses which the Prosecution alleges have been interfered with through a wider witness interference scheme; and (d) for the Chamber's overall assessment of the evidence and the determination of conflicting versions relating to alleged witness tampering.²
3. In previous applications of this nature, the Prosecution has sought³ (and has been granted) permission to add 174 items to its LOE for the purpose of providing contextual or circumstantial bearing to the circumstances wherein the witnesses may have recanted the statements given to the Prosecution.⁴
4. Due to the short time remaining before the commencement of the next trial session, and in accordance with the Trial Chamber's instructions,⁵ the Defence files this response on an expedited basis. The Defence files also this response as

¹ ICC-01/09-01/11-1606-Conf, Prosecution's eleventh application pursuant to Regulation 35(2) of the Regulations of the Court, 15 October 2014 ("Eleventh Application").

² Eleventh Application, para. 52.

³ ICC-01/09-01/11-1463-Conf-Corr, 21 August 2014 ("Eighth Application"); ICC-01/09-01/11-1474-Conf-Red, 29 August 2014 ("Addendum to Eighth Application"); ICC-01/09-01/11-1510-Conf, 12 September 2014 ("Supplementary Application"); ICC-01/09-01/11-1511-Conf, 13 September 2014 ("Ninth Application"); ICC-01/09-01/11-1532-Conf, 22 September 2014 ("Tenth Application").

⁴ See Eleventh Application, paras 12-15.

⁵ Via email to the parties on 16 October 2014.

confidential as it relates to an application of the same classification; it is willing to file a public redaction version following the Prosecution's provision of the same.

II. SUBMISSIONS

Regulation 35(2) Requirements

5. In light of the Chamber's previous decision on related applications, the Defence does not object to the addition of these materials to the Prosecution's List of Evidence, in terms of whether the Prosecution has satisfied the requirements of Regulation 35(2), namely that good cause has been shown or that the Prosecution could not have disclosed the materials previously for reasons outside its control. The Defence notes that the Chamber is typically satisfied with the Prosecution's argument, repeated in the Eleventh Application,⁶ that it has only recently concluded that it may require these documents in its examination of such witnesses.

Prejudice

6. The Defence acknowledges that in previous decisions, the Chamber has found that the prejudice to the Defence is minimized due to the nature and size of the items added, as well as the timing of their original disclosure. However, in relation to this Eleventh Application and contrary to the Prosecution's averment at paragraphs 77-78, the prejudice to the Defence is much greater, because 539 items being added at once, with limited time remaining prior to the examination of the relevant witnesses. This Chamber has explained that timelines in relation to disclosure obligations have at its core, the "aim [...] to avoid prejudice to the Defence, which is always an issue that is relative in light of the particular circumstances in which the matter is to be considered".⁷ In these particular circumstances, where most of the materials are substantive and detailed in nature, and the hearing of these witnesses' evidence begins in approximately three weeks, the addition of these materials is highly prejudicial.

⁶ See, Eleventh Application, paras 48-50.

⁷ ICC-01/09-01/11-899-Conf, Decision on the Prosecution's Requests to Add New Witnesses to its List of Witnesses, 3 September 2013, para. 19

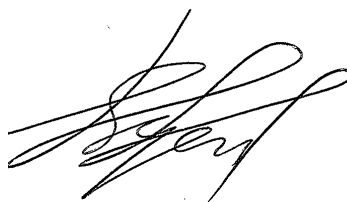
7. Additionally, the bulk of the materials do not relate to the substance of the charges against the accused – rather they relate to potential Article 70 charges⁸ – and so the Defence has not previously had occasion to investigate these peripheral allegations. This is an aspect of prejudice that the Prosecution has not considered.

Relevance

8. The Defence will have the ability to argue against the materials' relevance during any discussion as to use or admissibility of the materials,⁹ should any of the witnesses be determined to be hostile. Suffice to say, the Defence's position is that these Article 70-related materials are not germane to the question of whether or not the initial accounts provided by the witnesses to the Prosecution are truthful, accurate or reliable. The Defence submits that the focus of the trial must remain primarily on assessing the witnesses' accounts under oath, and secondarily the veracity of the original statements of the witnesses (and thus the culpability of the accused). In this regard the Defence expects that the Prosecution, in cross-examining its witnesses whom have been declared hostile, would attempt to introduce evidence, which could corroborate the witnesses' original accounts, rather than simply eliciting evidence of alleged interference as to why there has been a change in the account.

III. RELIEF REQUESTED

9. The Defence objects to the belated addition of 539 items to the Prosecution's List of Evidence, as it is highly prejudicial given the amount of material and the limited time remaining prior to the examination of the related witnesses.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 24th Day of October 2014
In Nairobi, Kenya

⁸ Eleventh Application, para. 81.

⁹ Eleventh Application, para. 79, FN 150.