

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 3 November 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 Ruto Defence response to the “Prosecution’s eleventh application pursuant to Regulation 35(2) of the Regulations of the Court”, dated 23 October 2014

Sources: Defence for Mr. William Samoei Ruto

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 William Samoei Ruto

Mr. Karim A. A. Khan QC
Mr. David Hooper QC
Mr. Essa Faal
Dato' Shyamala Alagendra
Ms. Leigh Lawrie

Counsel for Joshua Arap Sang

Mr. Joseph Kipchumba Kigen-Katwa
Ms. Caroline Buisman

Legal Representatives of the Victims

Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massida

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. On 15 October 2014, the *Prosecution's eleventh application pursuant to Regulation 35(2) of the Regulations of the Court* ("Eleventh Application")¹ was filed. In the application, the Prosecution seeks to add 539 items relating to seven witnesses² to its List of Evidence.³ If the application is granted, the Prosecution's List of Evidence will have increased by nearly 50% since 1 September 2014.⁴ Further, included within the 539 items are 65 items [REDACTED] which, as at the date of filing this response, [REDACTED].⁵
2. In the foregoing circumstances, the defence for Mr. William Samoei Ruto ("Defence") opposes the Eleventh Application.

II. Submissions

Items which have been disclosed to the Defence⁶

3. The Defence is mindful of the Trial Chamber's recent decisions permitting the Prosecution to add items to the Prosecution's List of Evidence,⁷ and finding that "any admissibility discussion will come at a later time".⁸ However, the Defence submits that the sheer number of the items, combined with the timing of the application, will result in real prejudice to the Defence and, thus, warrant the

¹ ICC-01/09-01/11-1606-Conf, 15 October 2014.

² The witnesses are: P-0015, P-0016, P-0019, P-0028, P-0336, P-0397 and P-0524.

³ Eleventh Application, para. 1.

⁴ As at 1 September 2014, the Prosecution's List of Evidence comprised 1509 items (*see* ICC-01/09-01/11-1065-Conf-Anx1-Red). Currently, the List of Evidence comprises 1683 items (*see* ICC-01/09-01/11-1568-Conf-Anx1). If the Eleventh Application is granted, the List of Evidence will comprise 2222 items. This amounts to a percentage increase since 1 September 2014 of 47.25%.

⁵ [REDACTED]

⁶ The Defence includes within this category audio material which has not yet been disclosed but in respect of which transcripts, translations and/or statements have been disclosed.

⁷ Decision on the Prosecution's Application for Addition of Documents to its List of Evidence, 3 September 2014, ICC-01/09-01/11-1485-Conf ("Decision on Eighth Application"); ICC-01/09-01/11-T-137-CONF-ENG ET 16-09-2014, p. 14, line 1 to p. 18, line 4 ("Oral Ruling"); Decision on the Prosecution's Ninth Application for Addition of Documents to Its List of Evidence, 19 September 2014, ICC-01/09-01/11-1527-Conf ("Decision on Ninth Application"); Decision on the Prosecution's Tenth Application for Addition of Documents to Its List of Evidence, 26 September 2014, ICC-01/09-01/11-1549-Conf ("Decision on Tenth Application").

⁸ Decision on Eighth Application, para. 38. *See also* Oral Ruling, p. 18, lines 1-3 ("However, the Chamber emphasises that this ruling concerns only the admission of these 11 items to the Prosecution's list of evidence and not their potential use at trial or admission into evidence"); Decision on Ninth Application, para. 19; Decision on Tenth Application, para. 19.

rejection in total of the Eleventh Application. In this regard, the Defence makes the following four specific observations.

4. *First*, the Defence acknowledges that during trial it is sometimes necessary to add items to the List of Evidence. However, the addition of 539 items is unprecedented and comes at an advanced stage of the proceedings. The Defence has finite resources. These resources should be focused on investigating a fixed target – the confirmed Prosecution case – rather than a case which is constantly evolving. This prejudice is heightened when it is recalled that the time now available to the Defence to investigate any items which are added to the List of Evidence is incredibly short. During the next trial session, which commences on 17 November 2014, four of the seven witnesses who are the subject of the Eleventh Application are scheduled to testify.⁹ Accordingly, if the Eleventh Application is granted, it is this short four week investigative window which will be available to the Defence to investigate and prepare for all material relating to these four witnesses.
5. *Second*, the Defence submits that the Prosecution's argument that the Defence has been "on notice...since 22 August 2014" of the Prosecution's intention "to rely on these sorts of items" is no answer to the Defence's concerns.¹⁰ Bare notice is no substitute for being directed to the actual items which are to be relied upon by the Prosecution as incriminatory evidence, particularly when at the time of giving notice some of the items are still the subject of Article 70 redactions. The Defence cannot deploy its limited resources to carrying out speculative investigations.
6. *Third*, as observed by this Chamber, prior disclosure of items as PEXO or Rule 77 evidence does not amount to notice of the Prosecution's intention to rely on

⁹ The four witnesses are: P-0336, P-0028, P-0016 and P-0524.

¹⁰ Eleventh Application, para. 78.

those items as incriminatory material.¹¹ Thus, it cannot be reasonably anticipated that full investigations and trial preparations have been properly conducted in respect of all 539 items by the Defence simply by virtue of the fact of disclosure.¹²

7. *Fourth*, and while cognisant of the Chamber's jurisprudence,¹³ the Defence submits that the fact that the relief requested is to add items to the List of Evidence and not to admit them into evidence will still result in prejudice. On addition to the List of Evidence, the items cannot be ignored. In order to discharge the Defence's professional duties, the items must be properly and thoroughly investigated if the Prosecution intends to use them to prove Mr. Ruto's guilt. Indeed, admission to the List of Evidence is simply stage one of a process, the ultimate goal of which is admission into evidence. Consequently, on admission to the List of Evidence the Defence must be ready to meet and challenge these items at the point when the Prosecution seeks their admission. In order to be ready, the Defence must allocate its resources to investigating all the items added.
8. In short, the Defence will simply be unable to analyse and review the items added to the List of Evidence in the manner it would and should be entitled to expect. This is no fault of the Defence but is the product of the nature and timing of the Prosecution's applications. The extent of the prejudice warrants the rejection of the Eleventh Application.

[REDACTED]

9. The Prosecution's request that it be permitted to add 65 items which [REDACTED] indicates a worrying prosecutorial attitude to these types of application.¹⁴ Effectively, the Prosecution appears to consider it has *carte blanche* to add any item to its List of Evidence, [REDACTED]. The Defence recalls the

¹¹ Decision on Eighth Application, para. 31.

¹² *Contra* Eleventh Application, paras. 4 and 77.

¹³ *Supra*, fn 7.

Prosecution's own submission regarding the fact that the parties have been "on notice...since 22 August 2014"¹⁵ and submits that [REDACTED].

10. Clearly, the Defence cannot agree to the admission of items [REDACTED]. Fairness dictates that the determination of this aspect of the Eleventh Application should be delayed [REDACTED].

III. Classification

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

IV. Requested Relief

12. For the reasons set out above, the Defence opposes the Eleventh Application.
13. The Defence also submits that the determination as to whether the 65 [REDACTED] items [REDACTED] should be added to the List of Evidence should be delayed until such time as the Prosecution [REDACTED].

Respectfully submitted,



Karim A.A. Khan QC
Lead Counsel for Mr. William Samoei Ruto

Dated this 3rd Day of November 2014
At The Hague, Netherlands

¹⁴ Eleventh Application, para. 75.

¹⁵ Eleventh Application, para. 78.