

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 30 July 2015

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 "Joint Defence request to file supplementary material relevant to "Joint Defence request under Article 54""", 10 November 2014, ICC-01/09-01/11-1645-Conf

Sources: Defence for Mr. William Samoei Ruto
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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**Victims Participation and Reparations
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Other

I. Introduction

1. On 3 November 2014, the defence for Mr. William Samoei Ruto and the defence for Mr. Joshua arap Sang (together the “Defence”) filed the *Joint Defence request under Article 54* (“Article 54 Request”)¹ in which the Defence request that the Trial Chamber order the Prosecution to urgently discharge its obligations under Article 54 of the Rome Statute (“Statute”) in order to obtain potentially exculpatory information concerning [REDACTED] by three Prosecution witnesses, namely [REDACTED], [REDACTED] and [REDACTED].
2. On 7 November 2014, as part of Rule 77 disclosure package 82, the Prosecution disclosed, *inter alia*, summaries of [REDACTED].² Certain of these summaries contain information relevant to the Article 54 Request.³
3. The Defence respectfully request the Trial Chamber to accept the submission of the summaries annexed to this filing and to consider them for the purposes of its final determination on the Article 54 Request.

II. Applicable Law

4. Article 64(6)(f) of the Statute provides in part that:

In performing its functions prior to trial or during the course of trial, the Trial Chamber may, as necessary:

[...]

(f) Rule on any other relevant matters.

¹ ICC-01/09-01/11-1627-Conf.

² The Defence advise that full [REDACTED] have not yet been disclosed. The Prosecution advised the Defence by email on 7 November 2014 that it has prioritised the production of summaries in order to identify [REDACTED] that may be relevant to the ICC proceedings.

³ See (i) [REDACTED], provided in confidential annex A, in which [REDACTED]; (ii) [REDACTED], provided in confidential annex B [REDACTED]; (iii) [REDACTED], provided in confidential annex C [REDACTED]; (iv) [REDACTED], provided in confidential annex D [REDACTED]; (v) [REDACTED], provided in confidential annex E [REDACTED]; (vi) [REDACTED], provided in confidential annex F [REDACTED]; (vii) [REDACTED], provided in confidential annex G [REDACTED]; (viii) [REDACTED], provided in confidential annex H, in which [REDACTED].

5. In the *Banda and Jerbo* case, Trial Chamber IV held that it could accept the submission of supplementary material relevant to, but received after, the filing of a defence request under Article 64(6)(f).⁴ As part of Trial Chamber IV's reasoning, the Chamber noted that the supplementary material did not raise any new facts or arguments, nor was it prejudicial to the Prosecution.⁵

III. Submissions

6. The Defence submit that the summaries of [REDACTED] annexed hereto are relevant to the Article 54 Request because they evidence a link between cooperation with the Prosecution and witnesses [REDACTED]. However, at the time of filing the request, the summaries had not yet been disclosed and, thus, could not be relied upon by the Defence. In these circumstances, the Defence submit that the Trial Chamber should act pursuant to Article 64(6)(f) to accept the summaries as part of the original request.
7. At the outset, the Defence note that the Prosecution's disclosure obligations under Article 67(2) of the Statute do not require a concrete determination that the evidence "will" affect the credibility of Prosecution evidence. Rather, all that requires to be established is that the evidence "may" affect the credibility of such evidence. That said, the summaries annexed hereto clearly support the argument that information concerning [REDACTED] by Prosecution witnesses [REDACTED] and [REDACTED] are relevant to their credibility because it provides one explanation for their motivation to become witnesses.
8. In the summaries, [REDACTED].⁶ One reasonable interpretation of these [REDACTED] is that the witnesses were motivated to become Prosecution

⁴ *Prosecutor v. Banda and Jerbo*, Decision on the "Defence Application to File Supplementary Material", 9 March 2012, ICC-02/05-03/09-307, para. 8.

⁵ *Ibid.*

⁶ [REDACTED], provided in confidential annex D [REDACTED]. *See also* [REDACTED], provided in confidential annex B [REDACTED]; (ii) [REDACTED], provided in confidential annex C [REDACTED]; (iii) [REDACTED], provided in confidential annex E [REDACTED].

witnesses in order to [REDACTED] and ancillary benefits rather than a desire to tell the truth.

9. In addition, certain of the summaries concern [REDACTED].⁷ It is reasonable to interpret these [REDACTED] as concerning the Prosecution witness [REDACTED] and attempts to have [REDACTED].
10. Given the relevance of the summaries to the Article 54 Request, the Defence submit that they can be accepted by the Trial Chamber under Article 64(6)(f) because they do not raise any new factual or legal arguments. Further, their acceptance would cause no prejudice to the Prosecution. This is particularly so when they originate from a Prosecution [REDACTED] operation.

IV. Classification

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

V. Requested Relief

12. For the reasons set out above, the Defence respectfully request the Trial Chamber to exercise its powers under Article 64(6)(f) of the Statute in order to accept the submission of the summaries annexed hereto and to consider them for the purposes of its final determination on the Article 54 Request.

⁷ [REDACTED] and [REDACTED], provided in confidential annex A, in which [REDACTED].

Respectfully submitted,



Mr. Karim A. A. Khan QC
Lead Counsel for William Samoei Ruto
Dated this 30th Day of July 2015
At The Hague, Netherlands



Mr. Joseph Kipchumba Kigen-Katwa
Lead Counsel for Joshua Arap Sang
Dated this 30th Day of July 2015
At Nairobi, Kenya