

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 29 June 2016

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 the Prosecution’s application pursuant to Regulation 35(2) for addition of documents to the list of evidence”, 18 September 2013, ICC-01/09-01/11-944-Conf

Source: 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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Other

I. Introduction

1. On the day before the start of trial, the Prosecution filed the *Prosecution application pursuant to Regulation 35(2) for addition of documents to the list of evidence* ("Request").¹
2. The defence for Mr. William Samoei Ruto ("Defence") defers to the Trial Chamber's discretion as to whether the documents referred to in the Request should be added to the Prosecution's list of evidence ("LoE") but observes that the Request is part of a prosecutorial approach to these proceedings marked by "lack of diligence, organisation and efficiency" which prejudices defence preparations by having to respond to matters at the very last minute.² The Request also provides inaccurate information to the Chamber about the Prosecution's compliance with Court orders.³ While the Defence appreciates that errors can be made in a case of this size, this inaccuracy is not an isolated incident and the Defence recalls the Trial Chamber's previous request for diligence in the presentation of information.⁴ Lack of accuracy again means that the Defence is prejudiced because it must expend considerable time double checking the Prosecution's assertions, even on basic matters.
3. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, this filing is submitted with the same classification as the Request.

II. Observations

4. The Defence makes the following three observations on the Request.

¹ ICC-01/09-01/11-915-Conf. The Defence notes that, while the document is dated 6 September 2013, it was not filed until 9 September 2013.

² ICC-01/09-01/11-859, para. 41.

³ Request, para. 5, bullet point 1 which is dealt with *infra*, para. 7.

⁴ ICC-01/09-01/11-762, para. 55.

5. *First*, the Defence notes that “[t]he final date for disclosure, set for 9 January 2013, was not altered.”⁵ While the Defence appreciates that the documents which are the subject of the request post-date the 9 January 2013 deadline, this does not explain the significant delay in respect of some items between the date of the relevant document and the date of its disclosure to the Defence.⁶ These delays clearly breach the Defence’s statutory right to timely disclosure and negatively impact on the Defence’s ability to adequately prepare for trial.
6. *Second*, no explanation is provided by the Prosecution in the Request as to why the Request was filed literally on the eve of trial. According to the information, the latest date of the documents at issue appears to be 16 July 2013 which was the date by which certain transcripts and translations had to be disclosed to the Defence.⁷ The other documents which are the subject of the Request were clearly in the possession of the Prosecution before this date.⁸ Nevertheless, it was not until the day before the start of the trial that the Prosecution thought to file the Request. These types of unnecessary delay are regrettable as it means that defence resources are diverted to deal with expedited filings at a critical time in proceedings, the calling of the first few witnesses. The Defence also recalls the observations of the Single Judge in respect of another late filed request that “[i]f such procedural performance were to be tolerated, this would taint the fairness and expeditiousness of the entire proceedings.”⁹
7. *Third*, in the Request the Prosecution misrepresents its compliance with Court decisions. At paragraph 5, first bullet point of the Request, the Prosecution

⁵ ICC-01/09-01/11-807, para. 6 citing to ICC-01/09-01/11-440, para. 14.

⁶ (1) P-0016’s statement is dated [REDACTED] 2013 but was not disclosed until 17 May 2013 (see Request, para. 5, bullet point 3 and footnote 14); (2) [REDACTED] statement is dated [REDACTED] 2013 but was not disclosed until 17 April 2013 (see Request, para. 5, bullet point 5 and footnote 16); (3) two one page statements of P-0015 dated [REDACTED] February 2013 but not disclosed until 10 June 2013 (Request, footnote 13(5)).

⁷ Request, para. 5, bullet point 6.

⁸ For example: (1) P-0016’s statement is dated [REDACTED] 2013 (see Request, para. 5, bullet point 3); and (2) [REDACTED] statement is dated [REDACTED] 2013 (see Request, para. 5, bullet point 5).

⁹ ICC-01/09-01/11-859, para. 41.

states that “the reports of expert witnesses...were disclosed in accordance with the Chamber’s decision ‘on the schedule leading up to trial’ after 9 January 2013” and cites to the filing ICC-01/09-01/11-440, paragraph 17. A review of the terms of this filing and the information provided in the Request clearly shows that, contrary to the Prosecution’s assertions, the expert reports were not disclosed “in accordance with the Chamber’s decision”. In fact the Trial Chamber ordered that “the reports of any expert witness who will be called during the prosecution case should be completed by **14 February 2013**” (emphasis in original).¹⁰ Footnotes 9 to 11 of the Request state that disclosure of the expert reports was made on 18 February 2013 and that disclosure of the translation of P-0464’s report was not made until 28 February 2013.

III. Relief sought

8. The Defence defers to the Trial Chamber’s discretion as to whether the documents referred to in the Request should be added to the LoE but observes that the Request is an example of the submission of yet another unjustified last minute request, shows that the Prosecution continues in its failure to effect timely disclosure, and contains misrepresentations of fact.

Respectfully submitted,



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

Dated this 29th Day of June 2016
At The Hague, The Netherlands

¹⁰ ICC-01/09-01/11-440, para. 17.