Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **28 November 2014**

TRIAL CHAMBER V(A)

Before: **Judge Chile Eboe-Osuji, Presiding**
Judge Olga Herrera Carbuccia
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 supplementary request to its eighth Application pursuant to Regulation 35(2) of the Regulations of the Court'", 15 September 2014

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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Other

I. Introduction

1. The defence for Mr. William Samoei Ruto ("Defence") opposes the *Prosecution's supplementary request to its eighth Application pursuant to Regulation 35(2) of the Regulations of the Court"* ("Application")[1] to add 11 new items to its List of Evidence.[2]

II. Submissions

2. At the outset, the Application should be considered in its proper context. On 3 September 2014, 80 new documents were added to the Prosecution's List of Evidence.[3] On 12 September 2013, the Prosecution filed a further application to add 45 new items to its List of Evidence.[4] The present Application concerns a request to add 11 further new items. If the two outstanding applications are granted, 145 new items will have been added to the Prosecution's List of Evidence in a matter of days.[5] Of concern is the fact that more applications are anticipated.[6] The result is that the material which the Defence is required to investigate and prepare to meet is growing exponentially.[7] There must be some finality to disclosure, particularly when the disclosure has only a "contextual or circumstantial bearing"[8] on the evidence of recanting witnesses and no direct

[1] ICC-01/09-01/11-1510-Conf, 11 September 2014.
[2] Application, para. 2.
[3] Decision on the Prosecution's Application for Addition of Documents to its List of Evidence, 3 September 2014, ICC-01/09-01/111485-Conf ("Decision").
[4] Prosecution's ninth application pursuant to Regulation 35(2) of the Regulations of the Court, 12 September 2014, ICC-01/09-01/11-1511-Conf.
[5] The Defence submits that assessing prejudice by reference to the number of pages of items is an artificial and potentially misleading exercise. The issue is not the number of pages of an item but its content. Significant allegations which will require considerable investigative time can be contained in just a few paragraphs. However, due to the number of items being disclosed on an almost daily basis, it is difficult for the Defence to make considered arguments in its various responses about the significance of the items. In any event, the significance of items only becomes clear after investigations have been conducted.
[6] 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, 22 August 2014, ICC-01/09-01/11-1463-Conf-Corr, fn. 3.
[7] As the Trial Chamber recently observed when considering whether to add 80 items to the List of Evidence "[w]hile many of the 80 documents were disclosed earlier in the trial, the Defence was not on notice of the Prosecution's intention to rely on those documents until the filing of the Application and the Addendum" (Decision, para. 31).
[8] Decision, para. 30.

bearing on the main charges. The Defence submits that such finality is warranted where, as here, the Prosecution is at fault on three fronts.

3. *First*, and fundamentally, the Defence questions whether the addition of such significant amounts of material to the List of Evidence would have been required had the Prosecution properly investigated this case at the outset. The Defence acknowledges that the justification for the addition of the material is the recantation of certain Prosecution witnesses from their original statements. However, rather than focusing all prosecutorial efforts on the recantation, the Defence submits that a more constructive approach would have been to investigate the witnesses' original accounts at an earlier stage in proceedings in order to ensure that they were accurate and could be supported. Had these basic checks and balances been performed when the statements of the witnesses at issue were first obtained, then the Prosecution would have been able to maintain its focus properly on the charges concerning the post-election violence and sought to controvert any recanting witness by recourse, *inter alia*, to objective evidence such as newspapers and other open source material. The Defence submits that one of the consequences of the paucity of the Prosecution's initial investigations is that the Defence is currently being deluged with material which is peripheral to the main charges.[9]

4. *Second*, the Application is triggered by the Prosecution's failure to not only properly appreciate the tenor of the applicable jurisprudence but to realise that fairness dictates that if it wishes to [REDACTED]. As regards fairness, [REDACTED], the Defence submits that it is particularly important that the parties, the Chamber and the witness all be given the opportunity to [REDACTED]. Indeed, where the [REDACTED].[10] Additionally, in such

[9] Decision, para. 36 ("the present case should focus on the issues of guilt or innocence of Mr Ruto and Mr Sang and the crimes with which they are charged").
[10] [REDACTED]

situations, tone can be an important element in assessing the evidence and something which cannot be conveyed in a transcript. Further, in respect of both [REDACTED], it is important that the parties and the witness are properly equipped to challenge the accuracy of the transcript and any mistranslations based on dialect or other matters. Provision of the audio allows this to happen because it is the best evidence and, thus, lessens the potential for error.

5. The Prosecution's reliance on jurisprudence from the cases of *Banda and Jerbo* and *Mbarushimana* in paragraph 11 and footnote 15 of the Application to support the position that the disclosure of audio recordings is not required is unfounded. Analysis of the Appeals Chamber judgement in *Banda and Jerbo* shows that a broad approach to disclosure is favoured, with the Appeals Chamber finding that "the ordinary meaning of the term "statement" as used in rule 76 is broad and requires the Prosecutor to disclose any prior statements, irrespective of the form in which they are recorded".[11] Further, in respect of interviews conducted under Article 55(2), the Appeals Chamber observed that "the audio or video-record of the questioning of a person in accordance with rule 112 of the Rules of Procedure and Evidence and the transcript thereof are records of statements that are potentially subject to disclosure pursuant to rule 76 of the Rules of Procedure and Evidence where the Prosecutor intends to call the person to testify as a witness." [12] Thus, while the Appeals Chamber went on to note that "the immediate question before the Appeals Chamber is not whether audio- or video-records of statements are subject to disclosure",[13] this judgement clearly favours the Defence rather than the Prosecution position. As regards the *Mbarushimana*

[11] *Prosecutor v. Banda and Jerbo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", 17 February 2012, ICC-02/05-03/09-295 ("*Banda and Jerbo* Judgement"), para. 23.
[12] *Banda and Jerbo* Judgement, para. 23.
[13] *Banda and Jerbo* Judgement, para. 24.

decision,[14] this is clearly not on point because the decision concerns the pre-trial phase of proceedings where disclosure obligations are not so strict and it is permissible for the Prosecution to rely on the summaries of statements of anonymous witnesses.

6. *Third*, and contrary to the Prosecution's assertion, [REDACTED].[15] The Prosecution argues that it [REDACTED].[16] However, on the basis of the Prosecution's current List of Witnesses it is unclear how the Report can be properly and reliably linked to the [REDACTED]. Further, the state of the record regarding P-0604's [REDACTED] is, in the Defence's view, not as clear cut as the Prosecution would assert.[17] P-0604 did not provide the [REDACTED] on the record.[18] Indeed, it appears from the Application that the Prosecution intends to now take a highly circuitous route to link what it asserts is P-0604's [REDACTED] in the Report.[19] However, even if that route is successful, as noted above it is unclear how the Prosecution intends to link the Report to the transcripts and audios.

7. The Defence observes that, while the Application is only to add the 11 items to the List of Evidence and not to admit them into evidence, prejudice still arises.[20] Admission to the List of Evidence is stage one of a process, the ultimate goal of which is admission into evidence. This means the Defence must be ready to meet all items added to the List of Evidence for whatever purpose the Prosecution ultimately seeks to use them. Consequently, on admission to the List of Evidence the Defence must allocate its resources to investigating all the items. The Defence appreciates the reality of trial proceedings at the international level which is that

[14] *Prosecutor v. Mbarushimana*, Decision on "Defence request to deny the use of certain incriminating evidence at the confirmation hearing" and postponement of confirmation hearing, 16 August 2011, ICC-01/04-01/10-378.
[15] Application, para. 16.
[16] Application, para. 16.
[17] Application, para. 16.
[18] [REDACTED]
[19] [REDACTED]
[20] Decision, para. 38.

evidence which the Prosecution will seek to rely on will often emerge during the course of trial. However, the situation with which the Defence in this case is faced is unprecedented. It is currently investigating the main case, while at the same time investigating another shadow case the parameters of which are constantly evolving with each disclosure. Indeed, a pattern is emerging in respect of the summonsed witnesses (who are evidently the Prosecution's key witnesses) whereby the Defence is often investigating recent disclosures made for the witness already testifying on the stand.

8. It is in these circumstances that the Defence submits that finality must be drawn in the disclosure it is expected to address as regards the evidence relating to P-0604 and P-0495. The 11 items are ancillary to the main charges. Thus, any perceived prejudice to the Prosecution by their non-addition to the List of Evidence is *de minimis*, is caused by fault and is outweighed by the prejudice caused to the Defence by their admission to the List of Evidence.

9. Finally, the Defence is concerned about the delays in effecting disclosure of [REDACTED] materials. For example, there appears to be considerable disclosure yet to be made arising from [REDACTED].[21] The Defence requests disclosure of all [REDACTED] materials, including lesser redacted versions of material already disclosed, as soon as possible.

III. Classification

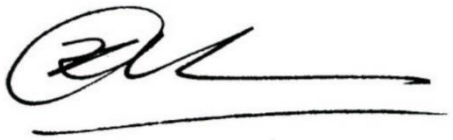
10. This response is filed confidentially pursuant to Regulation 23*bis*(2) of the Regulations of the Court.

IV. Requested Relief

11. For the reasons set out above, the Defence respectfully submits that the Application should be dismissed.

[21] [REDACTED]

Respectfully submitted,



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Dated this 28th Day of November 2014
At The Hague, Netherlands