

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **19 May 2015**

**TRIAL CHAMBER V(A)**

**Before:** Judge Chile Eboe-Osuji, Presiding Judge  
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**

**Prosecution's response to the Ruto Defence request for extension of time limit**

**Source:** Office of the Prosecutor

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

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**REGISTRY**

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**Victims and Witnesses Unit**

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**Victims Participation and Reparations  
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**Others**

## Introduction

1. Having first requested the Chamber to rule inadmissible<sup>1</sup> much of the Prosecution's Supporting Material in its Rule 68 request,<sup>2</sup> the Ruto Defence now seeks a further extension of time to respond<sup>3</sup>.
2. The Extension Request should be denied. The Ruto Defence has failed to show good cause for a *further* extension of two weeks – in addition to the three week extension already granted.
3. Furthermore, all of the relevant material was in the Defence's possession when it filed its Inadmissibility Request.<sup>4</sup> The Ruto Defence should have requested any extension it deemed necessary at that time, instead of seizing the Chamber and parties with yet another interlocutory filing.

## Confidentiality

4. This response is filed as Confidential since it responds to a filing of similar classification.

## Submissions

5. The Prosecution submits that the Ruto Defence has failed to show good cause for the *further* extension of time to respond to the Rule 68 Request. None of the four grounds advanced, individually or cumulatively, justify the relief sought.

### (i) Use of Supporting Material not on record

6. The first ground relied upon is the Ruto Defence's mistaken belief, at the time when the first extension was requested, that the Prosecution would rely only on evidence already on record. The Prosecution submits that incorrect assumptions by Defence counsel do not constitute good cause for an extension.

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<sup>1</sup> ICC-01-09-01/11-1872-Conf ("Inadmissibility Request").

<sup>2</sup> ICC-01/09-01/11-1866-Conf ("Rule 68 Request").

<sup>3</sup> ICC-01-09-01/11-1879-Conf ("Extension Request").

<sup>4</sup> The Rule 68 Request was filed on 29 April 2015. The Inadmissibility Request was filed on 4 May 2015.

7. Nor is this a reasonable assumption. The Prosecution has never represented that it would rely solely on evidence on record. Indeed, the use of supporting material is specifically mandated in Decision No. 4 on the Conduct of Proceedings.<sup>5</sup> Both the Prosecution and Ruto Defence have previously relied on supporting material that was not part of the trial record. Further, it should not come as a surprise that the Prosecution seeks to rely on evidence of interference that has been faithfully disclosed to the Defence over the course of the article 70 investigation – particularly evidence relevant to trial witnesses.<sup>6</sup>

**(ii) New “legal landscape”**

8. The Prosecution concedes that the Rule 68 Request addresses legal issues that have not been ruled upon before. However, this fact was known to the Ruto Defence when it made its initial request for an extension, which the Prosecution consented to. Accordingly, it does not provide good cause for a *further* extension.

9. Additionally, the scope of the legal issues has been known to the Defence for several months and it has had ample opportunity to research the relevant issues.

**(iii) The time available to the Prosecution**

10. The Prosecution submits that the length of the article 70 investigation is irrelevant to the Extension Request. The Defence is not being asked to respond to the entire article 70 case. Rule 68(2)(d) requires that the moving party establish that witnesses whose prior recorded testimony it seeks to admit have been subjected to interference. The Prosecution relies on the Supporting Material for that specific purpose. If the Defence oppose the factual basis of the Prosecution’s Rule 68 Request, then it is *that* contention that they must address, and not a separate case that they are not a party to.

11. While it is true that the Prosecution has anticipated filing a request of this nature for some time, this is not to say that it has been “working on its Rule 68

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<sup>5</sup> ICC-01/09-01/11-1312.

<sup>6</sup> See the Prosecution Response to the Inadmissibility Request, ICC-01/09-01/11-1874-Conf, para.31.

Application"<sup>7</sup> for all this time. Be that as it may, it is frequently the case that applicants may file at their leisure, yet respondents are nevertheless obliged to observe the 21 day response time. This fact alone does not provide good cause for a further extension.

12. In the present circumstances, the Ruto Defence argument is a double-edged sword. The Defence have likewise had extensive notice of the Prosecution's intended filing since 17 February 2014 and have thus also had the opportunity to prepare for their response.

**(iv) The scope of the Supporting Material**

13. The Ruto Defence asserts that it requires additional time to review the Supporting Material relevant to the 10 witnesses relied upon in the Rule 68 Request and related disclosures. The Prosecution submits that the scope of this exercise is exaggerated.

14. Firstly, nine of the ten witnesses relied upon were trial witnesses. Eight of them have already testified. It may be expected that the Defence should have reviewed all disclosed material relevant to these witnesses prior to their testimony. The fact that certain material was disclosed as PEXO/rule 77 is immaterial. The Ruto Defence has on many occasions vigorously asserted its right to such disclosure and they must be expected to diligently review it – particularly when it relates to trial witnesses. The Prosecution submits that the current extended response time of six weeks is ample for the Ruto Defence counsel to refresh their memories as to the contents.

15. Secondly, all this material was in the possession of the Ruto Defence when it filed its Inadmissibility Request. Thus, the Ruto Defence should already have been in a position to assess whether it needed additional time as a result. However, instead of requesting an extension at that time, the Ruto Defence chose to seek the exclusion of the material, now necessitating yet further interlocutory litigation. This time could

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<sup>7</sup> Extension Request, para.11.

rather have been spent by the Ruto Defence in preparing their response to the Rule 68 Request.<sup>8</sup>

### Relief

16. For the foregoing reasons, the Prosecution requests the Chamber to dismiss the Extension Request.



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**Fatou Bensouda, Prosecutor**

Dated this 19<sup>th</sup> day of May 2015

At The Hague, the Netherlands

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<sup>8</sup> The Ruto Defence seeks a further extension of two weeks. The Prosecution notes that this is the second interlocutory request in just over two weeks since the filing of the Rule 68 Request.