

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 23 July 2015

**TRIAL CHAMBER V(A)**

**Before:** Judge Chile Eboe-Osuji, Presiding Judge  
Judge Olga Herrera Carbuca  
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  
"Prosecution's Response to 'Joint Defence request to file supplementary material  
relevant to "Joint Defence request under Article 54"',  
12 November 2014, ICC-01/09-01/11-1649-Conf**

**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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**States Representatives**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Victims and Witnesses Unit**

Mr Nigel Verrill

## Introduction

1. In their 10 November 2014 Request (“Request to file Supplementary Material”),<sup>1</sup> the Defence request the Trial Chamber V(A) (“Chamber”) to accept and consider in its determination of the Defence’s 3 November 2014 Article 54(1)(a) Request,<sup>2</sup> summaries of [REDACTED].

## Confidentiality

2. The Office of the Prosecutor (“Prosecution”) files this confidentially, pursuant to Regulation 23*bis*(2) of the Regulations of the Court, as it responds to a Defence Request filed with the same classification.

## Submissions

3. The Prosecution does not object to the Chamber’s acceptance and consideration of the [REDACTED] in adjudicating the Defence’s Article 54(1)(a) Request. However, it submits that even with the additional material, the Defence has not demonstrated that the Prosecution violated its Article 54(1)(a) obligation to justify the judicial orders that they seek in their Defence Request.<sup>3</sup>

4. Contrary to the Defence’s submissions, the [REDACTED], whose existence the Prosecutor had already communicated to the Defence prior to [REDACTED], further undermine the Defence’s claim that the Prosecutor must obtain any and whatever [REDACTED] may exist, pursuant to Article 54(1)(a). The [REDACTED] do not provide any further particulars to the Defence’s rather sweeping claims that any and all information relating to the [REDACTED] contain exculpatory information, and therefore, the Prosecutor be ordered to obtain them pursuant to Article 54(1)(a). In particular, the Prosecution notes that the Defence do not explain how these

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<sup>1</sup> ICC-01/09-01/11-1645-Conf.

<sup>2</sup> ICC-01/09-01/11-1627-Conf, (‘Article 54(1)(a) Defence Request’).

<sup>3</sup> Article 54(1)(a) Defence Request, para. 5.

[REDACTED] demonstrate that the content of the [REDACTED] – is likely to contain potentially exculpatory material.<sup>4</sup>

5. The Defence's reliance on Article 67(2) is misconceived.<sup>5</sup> The Prosecution does not dispute that the test in Article 67(2) is couched in terms of whether the material in its possession "may" (rather than "will") affect the credibility of such evidence. But the same standard cannot be transplanted wholesale into the Prosecution Article 54(1)(a) determination as to whether or not it should carry out an investigation or a further investigation of an issue. The Article 67(2) standard in relation to the disclosure of exonerating material relates to material *already in the possession* of the Prosecution. On the other hand, in determining whether to embark on an investigation or further investigation of an issue in relation to potential material outside its possession or control, the Prosecution justifiably requires more than that required for an Article 67(2) determination.

6. As argued in its response to the Defence's Article 54(1)(a) Request, the Prosecution's Article 54(1)(a) obligation is not an infinite, unguided fishing expedition, and is not a surrogate for the Defence's investigation. The Prosecution bases its determination whether to investigate - or further investigate - an issue or matter on the totality of the material relevant to the matter or issue, examined in light of the larger body of the evidence so far collected.

7. The Prosecution has timely informed the Defence of the [REDACTED] and has comprehensively reviewed material relevant to the three witnesses in its possession, implemented the [REDACTED], and disclosed to the Defence all this material and [REDACTED]. Against this background, having assessed the totality of the evidence already obtained and subsequently disclosed to the Defence regarding the three Prosecution witnesses, and in light of the larger body of the evidence so far

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<sup>4</sup> [REDACTED].

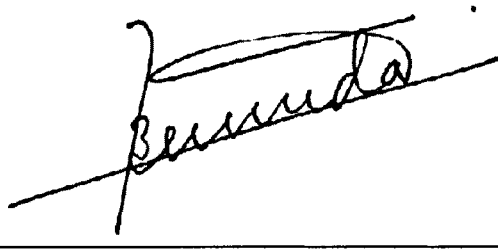
<sup>5</sup> Request to file Supplementary Material, para. 7.

collected, the Prosecution has in good faith determined that the further investigations requested by the Defence are not warranted.

8. The Prosecution reiterates that the Defence is legislatively empowered under Article 64(6)(b) to approach the Chamber to make relevant orders in relation to the material they seek.

### **Relief**

9. For the reasons above, the Prosecution does not object to the Chamber's acceptance and consideration of the [REDACTED], but maintains that the Defence's Article 54(1)(a) Request should be rejected.

A handwritten signature in black ink, appearing to read 'Fatou Bensouda', is written over a horizontal line. The signature is stylized and slanted upwards to the right.

Fatou Bensouda, Prosecutor

Dated this 23<sup>rd</sup> day of July 2015  
At The Hague, The Netherlands