

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 9 July 2013

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***

Public

Decision on request for additional time to disclose translations

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan
Mr David Hooper
Mr Kioko Kilukumi
Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa
Mr Silas Chekera

Legal Representatives of Victims

Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

Others

**Victims Participation and Reparations
Section**

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Rule 77 of the Rules (the ‘Rules’) and Regulations 35 and 39 of the Regulations of the Court (the ‘Regulations’), renders the following Decision on request for additional time to disclose translations.

I. Procedural Background and Submissions

1. On 10 June 2013, the Office of the Prosecutor (‘Prosecution’) filed a request for authorisation of the Chamber to delay the disclosure of transcripts and translations of a number of audio-video files (‘Request’).¹
2. In its Request the Prosecution informs the Chamber, *inter alia*, that it reviewed the audio-video material (‘A-V Material’) included in the Prosecution’s list of evidence,² following a request from the defence team for Mr Sang (‘Sang Defence’) to receive transcripts and/or translations of these materials.³ The Prosecution notes that it came to its attention, during the course of its review, that transcripts/translations had not been provided in respect of a number of items. It therefore decided not to rely on all the A-V Material.⁴ However, it identified six items on which it still wishes to rely and for which transcription and/or translation are still outstanding.⁵ For these items the Prosecution requests an extension of the disclosure deadline until the transcription and/or translation is completed. The Prosecution further explains that it understands the Chamber’s 3 June 2013 decision to

¹ Prosecution’s Update on Disclosure and Request for additional time to disclose certain materials, ICC-01/09-01/11-768-Conf with confidential annex ICC-01/09-01/11-768-Conf-AnxA.

² Annex C to Prosecution’s provision of materials pursuant to Decision ICC-01/09-01/11-440, 9 January 2013, ICC-01/09-01/11-540.

³ ICC-01/09-01/11-768-Conf, para. 7.

⁴ ICC-01/09-01/11-769-Conf, para. 8.

⁵ The items are listed in the annex to the Request.

set a disclosure deadline for 10 June 2013. The Prosecution's request for extension is in relation to this date.⁶

3. The Prosecution argues that it already disclosed transcriptions and/or translations of some of the A-V Material included in its list of evidence, yet it was not able to meet the disclosure deadline for all the A-V Material due to lack of qualified personnel available for the task, the amount of A-V Material and the time necessary to produce accurate transcripts and translations.⁷
4. On 20 June 2013, the Sang Defence filed its response to the Request in which it requests the Chamber to dismiss the Prosecution's Request.⁸ It recalls that during the status conference on 14 May 2013 the Prosecution stated its readiness to commence the trial immediately.⁹ Further, it avers that the Prosecution had ample notice of the fact that it had to provide translations and transcription of the A-V Material and that the Sang Defence itself alerted the Prosecution in an *inter-partes* communication to the fact that there were still outstanding transcripts and translations of A-V Material without having received any response from the Prosecution.¹⁰ Additionally, the Sang Defence submits that the Prosecution could have foreseen, given the specificities of the case, that a large amount of A-V Material would have to be translated.¹¹
5. The defence team for Mr Ruto did not file a response to the Request.

⁶ ICC-01/09-01/11-769-Conf, para. 10.

⁷ ICC-01/09-01/11-768-Conf, paras 7, 9.

⁸ Sang Defence Response to Prosecution's Update on Disclosure and Request for additional time to disclose certain materials, ICC-01/09-01/11-780-Conf with confidential annex ICC-01/09-01/11-780-Conf-AnxA.

⁹ ICC-01/09-01/11-780-Conf, para. 3; ICC-01/09-01/11-T22-Red-ENG, page 40, lines 21 to 25.

¹⁰ ICC-01/09-01/11-780-Conf, paras 3, 6.

¹¹ ICC-01/09-01/11-780-Conf, para. 9.

II. Analysis and Conclusion

6. The Chamber notes at the outset that in its decision of 3 June 2013 rescheduling the trial date it did not set a new deadline for disclosure, apart from disclosure of material relating to two witnesses whose addition to the Prosecution's list was authorised.¹² The consideration that three months between the full disclosure of the Prosecution case and the beginning of the trial are necessary to enable the defence teams for Mr Ruto and Mr Sang (together the 'Defence') to prepare adequately for trial was only a factor relevant to the Chamber's determination of a suitable trial date. The final date for disclosure, set for 9 January 2013,¹³ was not altered. The Chamber will nonetheless take into consideration the new trial date of 10 September 2013 when examining the present Request.
7. The Chamber recalls the previous jurisprudence of this Court, which states that a document or material is only effectively disclosed to the other party in accordance with Regulation 39(1) of the Regulations when it is provided in English or French or, in cases where the document or material is in another language, it must be provided with a translation into either of these two languages.¹⁴
8. The Chamber considers that, in order to fulfil the language requirements set out in Regulation 39(1) of the Regulations, the Prosecution is not formally obliged to disclose a translated transcript of A-V Material also in the original language. Strictly considered, the disclosure obligation would be met if the A-V Material itself and its translation are disclosed. The purpose of

¹² Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, ICC-01/09-01/11-762, p. 34.

¹³ Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-01/11-440, para. 14.

¹⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 24 July 2009, ICC-01/04-01/07-1336, para. 10; *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on commencement date of trial, 20 June 2013, ICC-01/09-01/11-763-Red, para. 36.

- Regulation 39 of the Regulations is to guarantee that the parties can fully understand the content of each piece that is filed with the Registry. Hence, it would be sufficient for present purposes to disclose a translation of the content of the A-V Material into one of the working languages of the Court.
9. However, even if the transcripts of the original language of the A-V Material are not captured within the strict legal scope of Regulation 39, the Chamber considers them to be material to the Defence in its preparation of the trial, for purposes of Rule 77 of the Rules, thus requiring their disclosure under that provision. That is to say: notwithstanding the question as to whether or not the Prosecution is obligated to transcribe the video-tape into the native language of its content, once they take the step of transcribing it and translating that transcription for purposes of disclosure, there is also an obligation to disclose the source transcription from which the translation is made.
 10. In respect of the fact that the Prosecution lacks qualified translators, the Chamber agrees with the Sang Defence that the particular circumstances of the case made it foreseeable that there would be a heightened workload for transcripts and translations from Kalenjin into English. The Chamber acknowledges that the process of transcribing and translating A-V Material is very labour intensive. Furthermore, the Chamber notes from the metadata of the original audio-video material, that the Prosecution had been in possession of this evidence since June or July 2012. Although the lack of translators cannot be an excuse for the Prosecution to disregard the disclosure deadline imposed by this Chamber, it is a relevant factor for the Chamber's determination of whether the delay in disclosure is appropriate.
 11. The Chamber however notes that the material concerned is limited to six items. Although some of the items contain various tracks, the Chamber

notes that in most instances these are some seconds or minutes long.¹⁵ Furthermore, the Chamber notes that all the items are originally in Kalenjin and both accused are Kalenjin and speak Nandi.¹⁶

12. The Chamber further notes that the Prosecution intends to provide these transcripts and translations to the Defence by mid-July 2013 and thus approximately two months before the commencement of the trial.¹⁷ Additionally, it appears that for one of the items listed, at least a partial translation has already been provided to the Defence.¹⁸
13. Moreover, the Chamber observes that in its response, the Sang Defence does not identify any difficulties resulting from the delay in disclosure and that the Ruto Defence has not responded at all.
14. In light of the above, the Chamber is of the view that although the Prosecution has not advanced justifiable reasons for the delayed production and disclosure of these translation, no apparent prejudice will be caused to the Defence if the transcripts and translation of the audio-video material listed in the annex of the Prosecution's Request is disclosed to the Defence at the time indicated by the Prosecution, particularly since the transcripts and translations relate to material already disclosed to the Defence and do not

¹⁵ KEN-OTP-0073-0193 is a video with audio containing 56 tracks, most of them last for some seconds and the longest track is 4 minutes long. The languages used are Kalenjin and Swahili. KEN-OTP-0073-0205 contains audio only, includes 2 tracks, one is 1 hour 15 minutes long and the other is 53 minutes long. The language used is Kalenjin. KEN-OTP-0073-0206 is a video with audio containing 30 tracks, most of them last for some seconds and the longest track is 13 minutes long. The language used is Kalenjin. KEN-OTP-0073-0207 is a video with audio containing 14 tracks, most of them last for some seconds and the longest track is 13 minutes long. The language used is Kalenjin. KEN-OTP-0075-0042, contains audio only, has 2 tracks, 47 and 46 minutes long. The language used is Kalenjin. KEN-OTP-0075-0078, contains audio only, has 2 tracks, 30 minutes long each. The language used is Kalenjin.

¹⁶ Annex A to First Joint Submission by the Prosecution and the Defence as to Agreed Facts and Certain Materials contained in the Prosecution's List of Evidence, 3 September 2012, ICC-01/09-01/11-451-AnxA, p. 2.

¹⁷ ICC-01/09-01/11-768-Conf-AnxA.

¹⁸ KEN-OTP-0073-0193 consists of 56 separate tracks. The last track provides subtitles in English for some parts which are previously shown and have not been translated.

contain *per se* new evidence.¹⁹ The Chamber therefore authorises the full disclosure of these items no later than 16 July 2013.

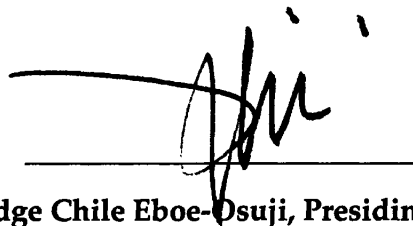
15. The Chamber notes that both the Request and the Sang Defence's response thereto were filed confidentially. However, as the present decision does not contain any confidential information, it will be filed publicly. The Prosecution and the Sang Defence are directed, no later than 12 July 2013, to seek re-classification of their respective filings to public, unless they wish to redact information, in which case they shall file redacted versions.

¹⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on prosecution's requests to add items to the evidence to be relied on at trial filed on 21 April and 8 May 2008, 4 June 2008, ICC-01/04-01/06-1377, para. 29.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

AUTHORISES the Prosecution to delay the disclosure of transcripts and translations of items KEN-OTP-0073-0193, KEN-OTP-0073-0206, KEN-OTP-0073-0207, and KEN-OTP-0075-0078 and translations of items KEN-OTP-0073-0205 and KEN-OTP-0075-0042 until no later than 16 July 2013.

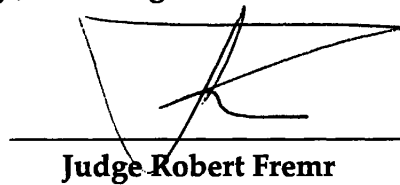
Done in both English and French, the English version being authoritative.

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Judge Chile Eboe-Osuji, Presiding

A handwritten signature in black ink, appearing to be 'Olga Herrera Carbuccion', written over a horizontal line.

Judge Olga Herrera Carbuccion

A handwritten signature in black ink, appearing to be 'Robert Fremr', written over a horizontal line.

Judge Robert Fremr

Dated 9 July 2013

At The Hague, The Netherlands