

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 30 September 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**

Confidential

Prosecution's Reply to the "Sang Defence Response to Prosecution Application pursuant to Regulation 35(2) for Addition of Documents to the List of Evidence"

Source: Office of the Prosecutor

Document 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 the Defence

For William Samoei Ruto:

Mr. Karim Khan

Mr. David Hooper

Ms. Shyamala Alagendra

For Joshua Arap Sang:

Mr. Joseph Kipchumba Kigen-Katwa

Ms. Caroline Buisman

Legal Representatives of the Victims

Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Counsel Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Mr. Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Others

1. With the leave of Trial Chamber V(a) ("the Chamber"), the Prosecution hereby replies to the "Sang Defence Response to Prosecution Application pursuant to Regulation 35(2) for Addition of Documents to the List of Evidence"¹ ("Sang Response") in order to correct the misunderstanding/misinterpretation contained therein regarding the Prosecution's previous submissions and undertakings with respect to retaining audio-video materials on its List of Evidence ("LoE").

Confidentiality

2. Pursuant to Regulation 23*bis*, the present filing is submitted as *confidential* given that it replies to a filing designated as such.

Procedural Background

3. On 3 June 2013, the Chamber issued a decision granting the Prosecution's request to re-introduce witnesses P-111 and P-471 to its witness list, ordering the Prosecution to disclose the identities of these witnesses and their statements to the Defence by 10 June 20213 and rescheduling the start date for trial to 10 September 2013.²
4. On 19 June 2013, the Prosecution filed the "Prosecution's Update on Disclosure and request for additional time to disclose certain materials"³ ("Prosecution's Request for Additional Time") seeking an extension to the disclosure deadline for a limited number of transcripts and translations of audio-video materials. For the remainder, the Prosecution undertook to remove items from its LoE for which transcripts and translations were not disclosed by the disclosure deadline. As explained further below, this undertaking was made on the understanding that

¹ ICC-01/09-01/11-949-Conf.

² ICC-01/09-01/11-762.

³ ICC-01/09-01/11-768-Conf.

the disclosure deadline had been extended to 10 June 2013. The Chamber granted this request on 9 June 2013.⁴

5. On 6 September 2013, the Prosecution filed an application pursuant to Regulation 35(2) to add documents to its LoE.⁵ The documents included 53 transcripts/translations of audio-video materials, listed in Annex 1 to that application ("Annex 1").
6. On 18 September 2013, the Sang Defence filed the Sang Response, opposing the addition of most of these transcripts/translations and contending that the Prosecution had backtracked on previous undertakings.⁶
7. On 23 September 2013, the Prosecution requested leave to reply to the Sang Response.⁷ The Chamber granted leave on 25 September 2013.⁸

Submissions

8. As indicated in its request for leave to reply, the Prosecution no longer seeks the inclusion on its LoE of three of the 53 transcripts/translations listed in Annex 1.⁹
9. Eight of the other 50 transcripts/translations (items 46-53 in Annex 1) were the subject of the Prosecution's Request for Additional Time. The Sang Defence does not object to the addition to the LoE of these materials.¹⁰
10. As regards the remaining 42 transcripts/translations (items 1-42 in Annex 1), these were all disclosed on or before 10 June 2013. In the Prosecution's Request for

⁴ ICC-01/09-01/11-807.

⁵ ICC-01/09-01/11-915-Conf.

⁶ ICC-01/09-01/11-949-Conf, paras. 12-13.

⁷ ICC-01/09-01/11-978.

⁸ ICC-01/09-01/11-989.

⁹ Items 43-45 in ICC-01/09-01/11-915-Conf-Anx1; ICC-01/09-01/11-915-Conf, para. 4. These were inadvertently included in the request. The audio-video materials that they relate to are included in the LoE, however the Prosecution intends to use them without sound, for the visuals only.

¹⁰ "[T]he defence requests that the Trial Chamber only allow the addition of those materials in the sixth category of materials (transcripts and translations), which were previously allowed by the Chamber to be disclosed on a delayed basis": ICC-01/09-01/11-949-Conf, paras. 14.

Additional Time, the Prosecution stated that it understood that 10 June 2013 was the deadline for the disclosure of *any other* materials the Prosecution may wish to rely on.¹¹ This understanding was based on the Chamber's ruling – in its decision rescheduling the trial date – that the identities and statements for P-111 and P-471 were to be disclosed by this date, and its statement in that decision that it considered “three months after the full disclosure of the evidence that the Prosecution intends to rely on at trial allows the Defence sufficient time to be ready for trial”.¹² Although the Chamber later clarified that the Prosecution misunderstood this aspect of the Chamber's decision,¹³ it is in this context that the Prosecution's undertaking to remove audio-video items from its LoE was made.

11. That is, when the Prosecution undertook to remove audio-video materials that did not have transcripts/translations disclosed in time from its LoE, it was relying on 10 June 2013 as the relevant disclosure deadline. As noted above, all of the 42 transcripts/translations in Annex 1 that the Sang Defence complains about were disclosed on or before this date. The Prosecution has in fact removed a number of audio-video materials from the LoE.¹⁴ All of those that remain have transcripts/translations which were disclosed by 10 June 2013, or whose late disclosure was authorized by the Chamber, or are intended to be used by the Prosecution without sound, relying on visuals only.

Conclusion

12. Therefore, it is conceded that the 42 items in question were not disclosed by the correct disclosure deadline, hence the request in terms of Regulation 35(2) to include them on the LoE. However, it is incorrect to state that the Prosecution had undertaken to remove them from the LoE.

¹¹ ICC-01/09-01/11-768, para. 6.

¹² ICC-01/09-01/11-762 para. 93.

¹³ ICC-01/09-01/11-807, para. 6.

¹⁴ Over 50 audio-video items have been removed from the version of the LoE filed on 9 September (ICC-01/09-01/11-915-Conf-AnxC. Cf. the list filed on 9 January 2013: ICC-01/09-01/11-540-Conf-AnxC-Red).

13. In these circumstances, the Prosecution submits that the Sang Defence's objection based on the Prosecution's previous undertaking is misplaced and accordingly requests that the Chamber grant its application to add the relevant documents to its LoE.



Fatou Bensouda, Prosecutor

Dated this 30th day of September 2013

At The Hague, the Netherlands