

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 25 October 2013

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
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 Redacted Version of

**Sang Defence Response to Prosecution Application pursuant to Regulation 35(2)
for Addition of Documents to the List of Evidence**

Source: Defence for Mr. Joshua arap Sang

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

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Legal Representatives of the Victims

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Defence**

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Other

I. INTRODUCTION

1. The prosecution was to have submitted a final List of Evidence ("LOE") to the parties nine months ago, by 9 January 2013.¹ On 9 September 2013, the defence received the prosecution's application pursuant to Regulation 35(2), for the addition of one-hundred and six (106) documents to the LOE, fifty-three (53) of which are transcripts or translations of other material.²
2. There are six categories of material which the prosecution seeks to add:³
 - i. Materials related to expert witnesses;
 - ii. Materials relating to P-15's recantation;
 - iii. A statement of P-16 related to P-15's recantation;
 - iv. A typed transcript of a handwritten statement by P-19 (which is on the LOE already);
 - v. A statement of P-524 where he describes [REDACTED]; and
 - vi. Transcripts and translations of fifty-three (53) of audio-video material (which are on the LOE already).
3. The prosecution does not offer a comprehensive explanation as to how it has satisfied the criterion of Regulation 35(2), namely that it was unable to file the List of Evidence, including these materials, "within the time limit for reasons outside his or her control". However, the defence does not object to the addition of the first four categories of material. Further, the defence does not object to the addition of the fifth category of material, but with a reservation.
4. The defence does object to the addition of much of the sixth category of material at this stage, for reasons outlined below.
5. The defence files this response confidentially, pursuant to Regulation 23bis(2). The defence files this response on an expedited basis, in line with the Chamber's directive via email on 10 September 2013.

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-440, Urgent Decision on the schedule leading up to trial, 9 July 2012, para. 13 ("The prosecution is also to file its list of evidence to be relied on at trial. Both the witness list and the list of evidence are to be submitted by 9 January 2013").

² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-915-Conf, Prosecution application pursuant to Regulation 35(2) for addition of documents to the list of evidence, 9 September 2013 ("Application").

³ Application, para. 1.

II. SUBMISSIONS

6. The defence does not object to the addition of the first category of material -- expert reports and the CVs of the experts⁴ -- because the Trial Chamber's deadline for disclosure of those materials was after the deadline for filing the List of Evidence, and because the materials have been disclosed more than three months prior to the start of the case.
7. The defence does not object to the addition of the second and third categories -- material relating to the recanting of prosecution witness P-15, including a statement of P-16 -- because these materials are an important component of his anticipated testimony and the events transpired following the original deadline for the List of Evidence.
8. The defence does not object to the addition of the fourth category of material -- the typed transcript of a handwritten statement of P-19 -- because it is an accurate transcript, which does not add anything new to the previous statement but may assist the parties and the Chamber in reading and understanding the material.
9. The defence does not object to the addition of the fifth category of material -- a statement of P-524 on [REDACTED] [REDACTED] -- because the events transpired following the original deadline for the List of Evidence. However, the defence notes that in its Application, the prosecution states that P-524 reported "[REDACTED]". The defence hopes the prosecution is not attempting to make any indirect, [REDACTED] in this regard.

[REDACTED] For the sake of clarity, the defence points out that at the time this [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴ Application, para. 5.

⁵ His identity was only disclosed to the defence, on 17 April 2013.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11. The defence does largely object to the addition of the sixth category of material – the transcripts and translations of audio and /or video excerpts, which the prosecution seeks to add to the LOE at this stage. The Chamber is aware that the Sang defence has long raised with the prosecution, the issue of un-disclosed translations and transcripts of Kalenjin audio and /or visual materials.⁷

12. The Chamber will recall that the prosecution previously made a Request for additional time to disclose certain materials,⁸ including transcripts and

⁶ KEN-OTP-0092-0868.

⁷ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-780-Conf, Sang Defence Response to Prosecution's Update on Disclosure and Request for additional time to disclosure certain materials, 20 June 2013.

⁸ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-768-Conf, Prosecution's Update on Disclosure and Request for additional time to disclose certain materials, 10 June 2013 ("Request").

translations of six items, which were on the LOE.⁹ In this Request, the prosecution indicated that a late review of its audio and/or visual materials, undertaken at the request of the defence, showed that transcriptions and translations were missing for a number of disclosed items. The prosecution then indicated that it would drop those items from its LOE:

Mindful of the prior jurisprudence of this Court, the Prosecution has therefore reviewed its list of evidence and now decided that it will no longer rely on all of the A/V materials contained therein.¹⁰

13. Now, it seems that the prosecution has backtracked on its undertaking, and indeed does not seek to remove items from its LOE that were not disclosed proper transcripts and translations in time. Rather, having told the Court and the parties that it would no longer rely on these materials, it now seeks to do just that. It seeks permission to rely on these materials as well as their late-disclosed transcripts and translations. This prejudices the defence in that it has organized its review of disclosure with the understanding that these un-translated audios and/or videos would not be used at trial. The Trial Chamber will of course appreciate that while the accused may speak Kalenjin, those members of the team conducting a review of the disclosure, do not.¹¹ Therefore, without a proper translation, the defence team of Mr Sang is unable to effectively prepare his defence in respect of these items.

III. CONCLUSION

14. The defence does not oppose the prosecution's Application to add the first five categories of material to the List of Evidence. However, the 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.¹² All other transcripts and

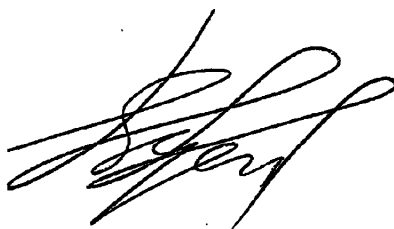
⁹ Request, ICC-01/09-01/11-768-Conf-AnxA: KEN-OTP-0073-0193, KEN-OTP-0073-0205, KEN-OTP-0073-0206, KEN-OTP-0073-0207, KEN-OTP-0075-0042, and KEN-OTP-0075-0078.

¹⁰ Request, para. 8 (citing e.g. ICC-01/04-01/07-1336, para. 13 where Trial Chamber II stated: "The Chamber is of the view that the transcripts and translations form an integral part of the video and must for that reason be considered as constituting one and the same piece of evidence – when one is missing, the evidence is not complete. Therefore, until the transcript and the necessary translations into one of the working languages of the Court have been provided to the Defence, the Prosecution has not complied with its disclosure obligations and its obligations under regulation 39(1) of the Regulations.").

¹¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-807, Decision on request for additional time to disclose translations, 9 July 2013, para. 12.

¹² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-807, Decision on request for additional time to disclose translations, 9 July 2013, p.9 (AUTHORISES the Prosecution to delay the disclosure of transcripts and

translations listed in the Request in Annex 1 should be rejected, and those audio and/or visual items relating to them, which remain on the List of Evidence, should be struck out.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 25th day of October 2013
In The Hague, The Netherlands

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).