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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

**Public redacted version of the corrected version of
“Prosecution’s eighth application pursuant to Regulation 35(2) of the
Regulations of the Court”, 21 August 2014, ICC-01/09-01/11-1463-Conf**

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

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Introduction

1. The Prosecution requests the authorisation of Trial Chamber V(A) (“Chamber”) to include 57 further documents on its List of Evidence pursuant to Regulation 35(2) of the Regulations of the Court and Articles 64(6)(d) and 69(3) of the Rome Statute (the “Request”). The 57 items relate to upcoming witnesses P-0604 and P-0495 and consist of previously disclosed items of evidence such as screening notes, statements, their annexes and associated documents, transcripts of interviews, reports relating to these witnesses [REDACTED] that were collected in the context of the Article 70 investigation throughout the course of 2013 and 2014.

2. For the reasons more fully explained below, these items are now assessed to be relevant to the evidence of witnesses P-0604 and P-0495, two of the witnesses against whom a summons to appear has been issued.¹ They are scheduled to be the first and second witnesses to appear in the September 2014 trial session² and for this reason the Prosecution has prioritised the evidence relevant to them in this request.³ The Prosecution has collected evidence in the context of the Article 70 investigation [REDACTED] and intends to lead P-0604 and P-0495 on this evidence, or alternatively, confront them with it during their examination. This evidence did not exist when the Prosecution filed its List of Evidence and thus could not have been included therein. As such, the Prosecution seeks their inclusion on its List of Evidence.

3. P-0604 and P-0495 [REDACTED], ceased their cooperation with the Prosecution. The Prosecution submits that [REDACTED] Prosecution witnesses – have been subjected to a concerted and elaborated witness interference scheme. [REDACTED]. The Prosecution intends to use this evidence (a) to prove that P-0604 and P-0495 [REDACTED] recanted their prior statements and/or withdrew

¹ ICC-01/09-01/11-1274-Corr2 and ICC-01/09-01/11-1377-Conf.

² ICC-01/09-01/11-1439-Conf, para. 6.

³ The Prosecution intends to submit a similar application in respect of the remaining summonsed witnesses at the earliest opportunity.

their cooperation with the Prosecution; (b) to prove that [REDACTED] was part of a wider witness interference scheme in which *other* Prosecution witnesses have been approached; and (c) to assist the Chamber with its overall assessment of evidence and determining matters related to alleged witness corruption. The Prosecution can also not rule out that P-0604 and/or P-0495 may be adverse to the Prosecution, and as such, may need to put to them prior conflicting accounts they have provided regarding the PEV. In this regard, the Prosecution notes that P-0604 has recently deposed to an affidavit purporting to recant his previous statements to the Prosecution. In addition, the Prosecution also intends to use the evidence contained in *ex parte* Annexes A and B to support any application it may make subject to Rule 68(2)(d)(i).

4. The Prosecution submits that the addition of these 57 documents will not cause unfair prejudice to the Accused, as the bulk of the materials⁴ have previously been disclosed to the Defence as either Rule 77 material or as potentially exonerating material. On 21 August 2014, all materials listed at confidential *ex parte* Annexes A and B were re-disclosed as incriminating evidence with previous redactions to the targets of the Article 70 investigation lifted. Any prejudice to the Defence is outweighed by the cogency of the information contained in these documents which is essential for a proper assessment of the evidence of these witnesses and to ensure that the Chamber has before it necessary evidence for the determination of the truth.

Confidentiality

5. The Prosecution submits this Request as Confidential, as it contains personal and identifying information related to witnesses P-0604 and P-0495 which must remain concealed from the public. The annexes are submitted as confidential *ex*

⁴ Save for eight items, being an [REDACTED] which were only being disclosed for the first time on 21 August 2014.

parte as they contain full unredacted versions of the proposed additions to be added to the Prosecution's List of Evidence. The Defence have access to all items appearing at annexes A and B *via* the Ringtail database.

Urgency

6. Given that these witnesses are due to commence testifying on 1 September and 5 September 2014 respectively, the Prosecution respectfully requests that the period for the filing of responses be shortened to enable the request to be decided prior to 1 September.

Statement of facts

7. On 9 July 2012, the Chamber issued its "Decision on the schedule leading up to trial", where it, *inter alia*, ordered the Prosecution to submit its witness list and List of Evidence by 9 January 2013.⁵
8. On 29 April 2014, the Chamber issued its "Decision on Summons and Request for State Cooperation", wherein it ordered, *inter alia*, a summons to be issued for P-0604 and P-0495 to appear as witnesses in this case.⁶

P-0604

9. The Prosecution initially interviewed P-0604 on [REDACTED]. His identity and statements were disclosed as incriminating material to the Defence on 9 September 2013.⁷
10. [REDACTED].⁸ [REDACTED].⁹
11. P-0604 was interviewed a second time on [REDACTED] in the context of the Prosecution's Article 70 investigation. This statement was disclosed as Rule 77

⁵ ICC-01/09-01/11-440, para. 13.

⁶ ICC-01/09-01/11-1274-Corr2.

⁷ P-0604 was not on the Prosecution's original List of Witnesses. The Chamber granted the Prosecution application to include P-0604 on the list [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

material with authorised redactions on 25 April 2014. It was disclosed in a lesser redacted form on 21 August 2014.

12. [REDACTED].¹⁰
13. P-0604 maintained contact with the Prosecution between this time and the next scheduled meeting of [REDACTED]. At the meeting, P-0604 again confirmed his willingness to testify before the Court.¹¹
14. On [REDACTED], the Prosecution met with P-0604 to advise him that he would be testifying in the trial session commencing 12 May 2014, and agreements as to his travel arrangement were reached. However P-0604 failed to show at the agreed time and rendezvous point and thus did not travel to The Hague. P-0604 failed to attend a further meeting in [REDACTED], after which the Prosecution requested his appearance by summons.¹²
15. On [REDACTED], P-0604 [REDACTED] requested to speak with the Prosecution. When the Prosecution called him back, P-0604 stated that he had seen that he was summoned on the internet and wanted to know if the decision could be reversed, and if he could come and testify voluntarily.¹³ The Prosecution subsequently met with P-0604 on [REDACTED], where he confirmed his renewed willingness to testify voluntarily in the upcoming trial session, commencing 1 September 2014.¹⁴
16. On [REDACTED], P-0604 met with the Prosecution in order to finalise his travel arrangements to The Hague and reiterated his willingness to testify on 1 September. [REDACTED]. The witness agreed to meet with the VWU

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

[REDACTED] in order to commence travel to The Hague [REDACTED].¹⁵ P-0604 did not arrive at the scheduled rendezvous.

17. On 11 August 2014, the Prosecution received an email from one Greg MUTAI of Kipsang & Mutai lawyers with an affidavit attached, purportedly from P-0604, wherein he recants the statement he had previously given to the Prosecution, makes accusations of improper inducements by the Prosecution and withdraws his cooperation as a witness.¹⁶

P-0495

18. The Prosecution initially interviewed witness P-0495 on [REDACTED]. His identity was disclosed to the Defence on 13 March 2013.
19. [REDACTED].¹⁷
20. [REDACTED].¹⁸
21. The Prosecution were scheduled to again meet with P-0495 on [REDACTED], but found that he had [REDACTED] disappeared.
22. Since then, the Prosecution has contacted P-0495 on several occasions to discuss [REDACTED], but have not met with him again. He has given no indication of renewed cooperation.

Submissions

Variation of the time and authorisation to disclose further evidence

23. The overarching objective of a trial is a fair proceeding at which the truth is established. The Trial Chamber, by virtue of Articles 64 and 69 of the Statute, has the authority to manage the trial, with due regard for the rights and obligations of the parties, and to request all evidence it considers necessary for the

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

determination of the truth. In managing the trial, the Chamber has the power to fix time limits, but also to vary those time limits by virtue of Regulation 35(2) of the Regulations of the Court: “After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.”

24. This Request is filed after the 9 January 2013 deadline to file the Prosecution’s List of Evidence because all the relevant events concerning the proposed additional evidence took place well after the 9 January 2013 deadline.
25. With respect to P-0604, the Prosecution was under the impression that he would appear voluntarily until it received the affidavit recanting his statement on 11 August 2014. The Prosecution was not in a position to disclose the fact that P-0604 had renewed his cooperation with the Prosecution until [REDACTED]. As such, the Prosecution did not know until 11 August that P-0604 would potentially be adverse, necessitating the request to rely on the documents listed in Annex A.
26. Both P-0604 and P-0495 have provided the Prosecution with statements in the context of its Article 70 investigation. [REDACTED], the Prosecution was not in a position to disclose [REDACTED] the Article 70 investigation to the Defence. [REDACTED]. However, taking into account that [REDACTED] the need to disclose [REDACTED] to the Defence in the Main Case in order to properly lead the evidence through P-0604 and P-0495, the Prosecution is now in a position to file this Request. All these circumstances fall outside the Prosecution’s control and the Prosecution thus justify extending the deadline for providing notice of the documents it intends to rely on at trial.

Relevance of the documents

27. [REDACTED].¹⁹ [REDACTED]²⁰

28. The Prosecution submits that the Chamber, in its quest for the determination of the truth, must have before it *all* relevant evidence. Without the information obtained by the Prosecution in the statements, transcripts and interviews, the Chamber will not have before it the complete picture with respect to P-0604's and P-0495's evidence. The Prosecution submits that the documents are relevant (a) to the issue of the witnesses' credibility and the reason for their withdrawal of cooperation and/or recantation; (b) for the purposes of cross-examination if the witnesses are adverse; (c) for corroboratory purposes with respect to *other* witnesses which the Prosecution alleges have been interfered with through a wider witness interference scheme; and (d) for the Chamber's overall assessment of the evidence and the determination of conflicting versions relating to alleged witness tampering.

Relevance of additional documents related to P-0604

29. The Prosecution requests permission to add to its List of Evidence (a) a statement and annexes taken in the context the Article 70 investigations;²¹ (b) a screening note relating to P-0604;²² (c) 13 Investigator Reports;²³ and (d) an affidavit purportedly from P-0604 recanting the statement he gave to the Prosecution.²⁴

30. As noted, on 11 August 2014 the Prosecution received an affidavit which purportedly originated with P-0604, recanting his statement and stating that the members of the Prosecution had promised "to give [P-0604] money and finance and a luxurious life" in exchange for false testimony implicating the Accused in

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

this case.²⁵ These accusations against the Prosecution are implausible and transparently fabricated. The Prosecution submits the affidavit [REDACTED]. The Prosecution seeks to include the affidavit on the List of Evidence in order to confront the witness with the contents thereof, should he recant his earlier statements in evidence. Similarly, the information he gave the Prosecution during his screening is relevant to the veracity of this affidavit.²⁶

31. P-0604 provides information regarding a broader witness interference scheme, which has targeted other Prosecution witnesses. [REDACTED]²⁷ [REDACTED]²⁸ [REDACTED],²⁹ [REDACTED],³⁰ [REDACTED]³¹ [REDACTED]³² [REDACTED]. This information will not only corroborate the evidence of other witnesses with respect to witness interference, but will also be used by the Prosecution to support any future application pursuant to Rule 68(2)(d).
32. Finally, the Prosecution seeks to introduce the evidence listed in Annex A to assist the Chamber in its overall assessment of the evidence provided by P-0604 and other witnesses, and in determining matters related to alleged witness corruption, which have been raised by both Defence.
33. The Prosecution's and Defence's competing versions as to who has been corrupting Prosecution witnesses and for what purpose has become a central issue in this trial. The evidence listed in Annexes A and B (and similar evidence pertaining to attempts to corrupt other Prosecution witnesses) is clearly relevant to the determination of this issue. [REDACTED].

Relevance of additional documents related to P-0495

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

34. The Prosecution requests permission to add to its List of Evidence (a) transcripts of interviews and associated documents conducted in the context of the Article 70 investigations;³³ (b) a screening note relating to P-0495;³⁴ (c) [REDACTED],³⁵ and (d) six Investigator Reports.³⁶
35. P-0495 had been summoned to appear on 5 September 2014. Although initially cooperative, since June 2013 he has not indicated any willingness to attend the trial voluntarily. The Prosecution is mindful of the fact that P-0495 may become adverse to its case, [REDACTED]. As a result, the Prosecution may need to put to him his prior statements, including information he provided to the Prosecution during his screening.³⁷ [REDACTED]³⁸ [REDACTED].³⁹ Since [REDACTED] September 2013, P-0495 has been uncooperative. The Prosecution anticipates the necessity to use this evidence to show why P-0495 withdrew his cooperation from the Prosecution, despite previously being a willing witness and confirming his intent to testify.⁴⁰ The Prosecution submits that this information is vital in confirming that the statement P-0495 initially gave in [REDACTED] is an accurate account of P-0495's recollection of the PEV, and that any contradicting account he may give [REDACTED].
36. P-0495 also provided information regarding a broader witness interference scheme, targeting other Prosecution witnesses, [REDACTED]⁴¹ [REDACTED].⁴² [REDACTED]⁴³ [REDACTED]⁴⁴ [REDACTED].
37. [REDACTED]⁴⁵ [REDACTED]⁴⁶ [REDACTED]⁴⁷ which it may need to put to the witness during its examination of the witness. The Prosecution submits that P-

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

0495's evidence of the wider witness interference scheme will not only corroborate the evidence of other witnesses, but will also be relevant to any future application pursuant to Rule 68(2)(d).

38. Finally, the Prosecution seeks to introduce the documents listed in Annex A to assist the Chamber in its overall assessment of the evidence provided by P-0495 and other witnesses, and in determining matters related to alleged witness corruption, which has been raised by both the Defence and the Prosecution throughout the course of the trial, as detailed further in paragraphs 30-33 above.

Addition of documents to the List of Evidence is not prejudicial to the Accused

39. The Prosecution submits that the addition of the 57 documents is not prejudicial to the Accused, as they have been disclosed to the Defence with sufficient notice prior to P-0604's and P-0495's appearance at trial. With respect to P-0604, the screening note, statement, annexes and [REDACTED] listed in Annex A were all previously disclosed to the Defence as material falling within the ambit of Rule 77, save for seven items.⁴⁸ The recanting affidavit and cover email were disclosed as potentially exonerating material on 13 August 2014. The Prosecution re-disclosed all documents as incriminating material on 21 August 2014, with all redactions to targets of the Article 70 investigation lifted. Similarly with respect to P-0495, all documents were previously disclosed as either Rule 77 or potentially exonerating material, save one⁴⁹. The Prosecution re-disclosed all documents as incriminating material on 21 August 2014 and lifted the redactions to targets of the Article 70 investigation.
40. The documents listed in annexes A and B do not bring new facts to the matters charged in the Prosecution's Document Containing the Charges, but as outlined

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED] were only disclosed for the first time on 21 August 2014.

⁴⁹ [REDACTED] was only disclosed on 21 August 2014.

above, provide information with respect to interference P-0604 and P-0495 have been exposed to.

Relief requested

41. The Prosecution seeks the following relief:
- (a) Pursuant to Regulation 35(2) of the Regulations of the Court, variance of the Chamber's deadline to submit all its documents on the Prosecution's List of Evidence by 9 January 2013.
 - (b) Pursuant to Articles 64(6)(d) and 69(3) of the Rome Statute, authorisation to include 57 documents listed in confidential *ex parte* Annexes A and B on the Prosecution's List of Evidence.
 - (c) The shortening of the time frames for responses, as the Chamber sees fit.



Fatou Bensouda, Prosecutor

Dated this 10th day of September 2014

At The Hague, the Netherlands