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No.: **ICC-01/09-01/11**
Date: **12 September 2014**

TRIAL CHAMBER V(A)

Before: **Judge Chile Eboe-Osuji, Presiding**
Judge Olga Herrera Carbuccia
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

Confidential Sang Defence Response to Prosecution's Eighth Application pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-1467-Conf (27 August 2014)

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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I. INTRODUCTION

1. On 22 August 2014, the Office of the Prosecutor ("Prosecution") requested authorisation to include an additional 57 incriminating items on its List of Evidence, for use with upcoming Prosecution witnesses P-0604 and P-0495 ("Application").[1] The purported purpose of these additional materials is to enable the Prosecution to confront its own witnesses should they testify to a version of events different from that which they told the Prosecution initially, or to allow the Prosecution to lead evidence in relation to ongoing Article 70 investigations.[2]

2. The Defence for Mr. Joshua arap Sang ("Defence") submits that this Application must be rejected, as it is filed inordinately late, and it is most certainly prejudicial to the Defence. It is also based on a false (or at least unproven) premise, namely that "P-604 and P-495 have been [redacted], ceased their cooperation with the Prosecution"; further, that this has been part of a "concerted and elaborated [sic]" witness interference scheme.[3] Ultimately, it abuses the summonses which have been issued by this Chamber, by expanding the scope and purpose of the witnesses' anticipated testimony. It may also complicate ancillary judicial proceedings in respect of Article 70 individuals. Consequently, the Defence opposes the addition of these 57 documents.

3. Due to the belated filing of the Prosecution Application, and in accordance with the Trial Chamber's instructions,[4] the Defence files this response on an expedited basis. The Defence files this response as confidential as it relates to an application of the same classification.

II. APPLICABLE LAW

4. Pursuant to Article 64(3)(c) of the Rome Statute, all incriminating material must be disclosed 'sufficiently in advance' of the start of the trial. Rule 76 requires the Prosecution to provide the Defence with the names of witnesses whom the

[1] *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1463-CONF-Corr, Corrected version of "Prosecution's eighth application pursuant to Regulation 35(2) of the Regulations of the Court", 21 August 2014 ("Application").
[2] Application, para. 28.
[3] Application, para. 3.
[4] Via email to the parties on 22 August 2014.

Prosecution intends to call to testify and copies of any prior statements made by those witnesses 'sufficiently in advance to enable the adequate preparation of the defence'. Indeed, pursuant to Rule 84, any necessary orders which the Trial Chamber shall make for the disclosure of documents or information and for the production of additional evidence must be done in such a way so as to avoid delay and *ensure that the trial commences on the set date* (emphasis added). Thus the Statute and the Rules emphasize the need for all incriminating disclosure that will be relied upon at trial to be made sufficiently in advance of the start of the trial.

5. This Trial Chamber has previously held that the expression "sufficiently in advance" of trial is an expression of "no fixed meaning", but that at its core, its "aim is to avoid prejudice to the Defence, which is always an issue that is relative in light of the particular circumstances in which the matter is to be considered".[5]

6. However, the Prosecution files its application to belatedly add 57 incriminatory documents to the List of Evidence pursuant to:

> <u>Regulation 35(2) of the Regulations of the Court</u>
>
> The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. 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.
>
> <u>Article 64(6)(d) of the Rome Statute</u>
>
> In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.
>
> <u>Article 69(3)</u>
>
> The parties may submit evidence relevant to the case, in accordance with article 64.The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

[5] ICC-01/09-01/11-899-Conf, Decision on the Prosecution's Requests to Add New Witnesses to its List of Witnesses, 3 September 2013, para. 19. (The Chamber ultimately allowed the Prosecution to add P-604 and P-613 to its list of witnesses, one week prior to the start of trial, but directing that all relevant disclosure be made the day prior to the start of trial, and that the two witnesses only be called among the last witnesses of the prosecution case).

III. Submissions

Late Application and Articles 64(6)(d) and 69(3)

7. All incriminating material, which the Prosecution intended to rely upon at trial, was to have been disclosed by 9 January 2013; trial commenced almost a full year ago, on 10 September 2013. The Prosecution and the Trial Chamber have severally stated that Article 70 issues would not form part of the Main Case. Indeed, the evidence of twenty-one Prosecution witnesses has been heard, with this understanding in mind.[6] Now the Prosecution wants to change the game. This is not permissible, nor fair.

8. Prior to the start of trial, the Defence raised concerns that Article 70 allegations were being bandied about, without proper disclosure and in such a way that it clouded the issues of the Main Case and would result in a secondary level of investigations for the Defence.[7] As a result of these concerns, namely that the Defence would be expected to defend against ancillary issues in addition to the charges in the Main Case, the Chamber clarified that:

> Any possible charges brought pursuant to Article 70 would be part of a separate case, not brought before this Chamber. Consequently, these allegations will not affect the preparation time in the current case; unless the Prosecution at trial intends to rely on additional evidence that forms part of Article 70 allegations, in which case it must disclose this material, and apply to the Chamber to add it to the LoE.[8]

This decision was rendered on 3 June 2013, and the trial was set to start on 10 September 2013. Therefore, it fell within the Chamber's discretion to change the disclosure date it had set, but to still ensure that all materials were disclosed sufficiently in advance of trial, in accordance with Article 64(3)(c). It follows that the Chamber intended that any application to add Article 70 materials for

[6] The witnesses called include P-613, who [redacted] the materials the Prosecution now seeks to add to the List of Evidence. If this Application is allowed, P-613 may have to be recalled.
[7] These concerns were addressed at length during a status conference on 15 May 2013; see ICC-01/09-01/11-T-23-Conf, pg. 32 et seq.
[8] ICC-01/09-01/11-762, Decision on the Prosecution Requests to Add Witnesses and Evidence and Defence Requests to Reschedule the Trial Start Date, 3 June 2013, para. 89.

inclusion in the Main Case would have been brought in the time between the decision and the start of trial three months later.

9. The Prosecution must have realized that it is too late for it to request for the addition of materials to the List of Evidence in the usual way, and as such is seeking for the Trial Chamber to exercise its own powers under Article 64(6)(d) to "order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties".

10. Trial Chamber II, whose approach may be persuasive here, has determined as follows in relation to the late addition of incriminating materials to the List of Evidence:

> If the new material is incriminating, the Chamber may still consider late addition, using its powers under article 64(6)(d) and 69(3) of the Statute, but only if it can be shown that (i) the new material is either significantly more compelling than other items of evidence already disclosed to the Defence, or brings to light a previously unknown fact which has a significant bearing upon the case, and (ii) the late addition will not cause undue prejudice to the Defence in relation to the latter's right to have adequate time and facilities to prepare in accordance with article 67(l)(b) of the Statute.[9]

11. Trial Chamber II determined that it may allow the late submission of materials it deems it necessary for the determination of the truth, as long as this does not jeopardise the Defence's right to have adequate time in order to prepare. It continued to state:

> If the length of time and resources that are reasonably required by the Defence to prepare a meaningful response to the new items of evidence are disproportionate to the limited interest of the Chamber in having the additional item of evidence discussed at trial, the item may still be rejected.[10]

12. Following this test, the Prosecution application must fail, as the application could have been made earlier, the additional material does not have a significant bearing upon the Main Case, it is not necessary for the determination of the truth, and because its late addition will cause undue prejudice to the Defence, in terms

[9] *Prosecutor v. Katanga and Ngudjolo,* ICC-01/04-01/07-1552, Decision on Prosecution Requests ICC-01/04-01/07-1386 and ICC-01/04-01/07-1407 made pursuant to Reguation 35 of the Regulations, 23 October 2009 (see also ICC-01/04-01/07-1336 and ICC-01/04-01/07-1869).
[10] *Prosecutor v. Katanga and Ngudjolo,* ICC-01/04-01/07-1515-Corr, Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009, 9 October 2009, para. 26.

of not having adequate time and facilities to conduct investigations into Article 70 matters, prior to testimony on 1 September 2014.

Materials Are Not Necessary for the Determination of the Truth

13. Witnesses P-0604 and P-0495 have been the subjects of a summons since 19 June[11] and 29 April 2014[12] respectively, on the basis that they will provide evidence, which is key to the charges against the accused in the Main Case. The Prosecution now seem afraid that when the witnesses come to testify, the narrative that they provide will not match the one provided to the Prosecution previously. The Prosecution makes a bold assumption that in fact "P-604 and P-495 have been [redacted], ceased their cooperation with the Prosecution".[13]

14. In addition to being an unjustifiably conclusory statement about ongoing Article 70 investigations, the information disclosed to the defence with respect to both witnesses does not necessarily support this assumption.[14] Indeed, the disclosures with respect to P-0604 indicate that he has ceased cooperation because he does not want to come to court and continue giving a false account. The disclosures with respect to P-0495 indicate that the last time he was in contact with the Prosecution, they told him that he was a suspect in their Article 70 investigations. Both could be valid reasons for ceasing cooperation, and neither are necessarily the [redacted].

15. On 11 August 2014, witness P-0604 recanted much of his initial account and explained through an Affidavit, "I refused to go to The Hague and testify as requested as the testimony I had given to the office of the Prosecutor's Investigators was false".[15] He has also made it clear that he had long been disillusioned with the Prosecution/VWU on account of its failure to provide the "luxurious lifestyle" that he had expected.[16] He has told Prosecution investigators

[11] ICC-01/09-01/11-1377.
[12] ICC-01/09-01/11-1274-Corr.
[13] Application, para. 3.
[14] The Chamber has previously warned the Prosecution about providing factually incorrect submissions and urged it to be more diligent in the future. ICC-01/09-01/11-762, para 55.
[15] KEN-OTP-0135-1135, para 14.
[16] KEN-OTP-0135-1135, para. 15.

that he has not been approached to withdraw as a witness, nor offered any money; in fact, he says he has never met [redacted] (whom the Prosecution [redacted]).[17] Investigator Reports show that as far back as [redacted] 2013, P-0604 "fears talking to VWU staff", had disagreements over accommodation-lease arrangements, stated that he was not happy and reiterated that he "wishes to go back home", and raised significant financial issues.[18] Notably, and despite its pious proclamations that it wants the Chamber to know "the truth",[19] the Prosecution do not seek to add these Investigator's Report into its List of Evidence. These are striking omissions if the Prosecution's genuine aim is to assist the Chamber in determining the truth, rather than looking for an excuse as to why its case is not proceeding as planned.

16. With respect to witness P-0495, the Defence notes that the last substantive contact the Prosecution had with him was in [redacted] 2013, during an interview in which they conducted an interview pursuant to [redacted].[20] It is no wonder that, upon reflection overnight, the witness decided to check out of his hotel and disappear, rather than to continue giving a statement to the Prosecution, [redacted]. After all, he had been told that continuing the interview was a voluntary process.[21] Perhaps the Prosecution has realized that it is not wise to [redacted], while at the same time expecting them to continue cooperating as a witness in the Main Case. Regardless, it is not fair to conclusively state that the reason P-0495 has ceased cooperation with the Prosecution is because [redacted]; it could be for a myriad of reasons, including his [redacted]. At this stage, the Prosecution does not have any indication as to whether P-0495 will stick to his original narrative or give a different version. But hypothetically, it may be possible for P-0495 to explain why there is a genuine difference in his

[17] KEN-OTP-0135-0472_R02; contra, Application, paras. 10, 31.
[18] KEN-OTP-0138-0062.
[19] Application, paras. 23 and 28.
[20] Application, paras. 20-21; KEN-OTP-0130-0462, KEN-OTP-0130-0478, KEN-OTP-0130-0507, KEN-OTP-0130-0540, KEN-OTP-0130-0563, KEN-OTP-0130-0566, KEN-OTP-0130-0585.
[21] KEN-OTP-0130-0585 at 0586.

accounts, without needing to be confronted with Article 70 issues, which in the Prosecution's own admission, are a distraction to the Main Case.[22]

Prejudice to the Defence

17. The Prosecution claims that it had disclosed the additional materials to the Defence with "sufficient notice" prior to the witnesses' appearance at trial.[23] Not only is this incorrect, but it goes against the spirit of Article 64(3)(c) and the principle that incriminating disclosure should be made prior to the start of trial. Although many of the materials have been disclosed to the defence in the last few months, they were in heavily redacted formats, which hid the identity of the individuals suspected of involvement in Article 70 activities. Not until 21 August 2014 were these redactions lifted. Prior to the redactions being lifted, the Defence did not have any ability to investigate the allegations; nor frankly, did it have any interest in doing so, because of the presumption that these issues would not form part of the Main Case.

18. The Defence is at a grave disadvantage given we were told a mere six days ago that the Prosecution has completely changed its approach and now wants to make witness interference a core aspect of the testimony of the summons witnesses. There is simply no time nor resources to pursue these matters.

Jurisdictional Complications

19. Jurisdictional complications weigh against the addition of the materials to the List of Evidence, for the Prosecution's stated purposes.

20. The Prosecution has disclosed that [redacted] individuals – [redacted] – are the focus of Article 70 investigations in respect of [redacted] witnesses.[24] It is not clear to the Defence whether the Prosecution intends to press charges formally against these [redacted] individuals or

[22] ICC-01/09-01/11-T-23-Conf, p. 42. (Ms Tai stated: "We are here, all of us are here, to talk about the charges that were confirmed against Mr Ruto and Mr Sang. That's all. So we believe that this is separate and apart. It's raised as a somewhat distraction. We believe it's all a distraction").
[23] Application, para. 39.
[24] Application, para. 31.

not. Of course, if they do, questions of interference must first be heard before the Pre-Trial Chamber, and if confirmed, during a full trial. It is simply not advisable for the judges of Trial Chamber V(A) to be involved in fact-finding in relation to the same issues, which may result in the Chamber pre-judging whether or not interference occurred, without the involvement of the individuals implicated.

21. It also seems as if the Prosecution is desperate to rely on the summons that have already been issued for these witnesses in the Main Case, in order to elicit testimony (for which they were not summoned), so that the Prosecution might later use the transcripts against individuals in Article 70 proceedings (without having to compel them to testify a second time in a future proceeding) or for the purpose of Rule 68(2)(d) applications. The Defence submits that this is a mis-use of the summons as issued and the Chamber should safeguard the integrity of its decisions on summons and limit the scope of the examination accordingly.

IV. CONCLUSION

22. For the foregoing reasons, the Defence prays that the Trial Chamber reject the addition of the 57 materials and not allow them to be included on the List of Evidence.

Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 12th day of September 2014
In The Hague, The Netherlands