

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 19 September 2014

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuca
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

Confidential

**Decision on the Prosecution's Ninth Application for Addition of Documents
to Its List of Evidence**

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

The Office of the Prosecutor

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Mr James Stewart
Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan
Mr David Hooper
Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

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

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

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*, pursuant to Articles 64(2) and 67(1) of the Rome Statute (the 'Statute') and Rules 76, 77 and 84 of the Rules of Procedure and Evidence (the 'Rules') renders the following Decision on the Prosecution's Ninth Application for Addition of Documents to Its List of Evidence.

I. PROCEDURAL HISTORY

1. 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 2013.¹
2. On 9 January 2013, the Office of the Prosecutor (the 'Prosecution') filed its list of evidence (the 'List of Evidence').²
3. On 17 April 2014, the Chamber issued its 'Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation', wherein it ordered, *inter alia*, a summons to be issued for Witnesses 516 and 524 to appear as a witnesses in this case.³
4. On 3 September 2014, the Chamber issued its 'Decision on the Prosecution's Application for Addition of Documents', in which it granted the Prosecution's application to add 80 items, relating to Witnesses 604 and 495, to its List of Evidence (the '3 September Decision').⁴

¹ ICC-01/09-01/11-440, para. 13.

² Annex C of the Prosecution's provision of materials pursuant to Decision ICC-01/09-01/11-440, 9 January 2013, ICC-01/09-01/11-540-Conf-AnxC-Red. For the most recent List of Evidence, see Annex 1 to Prosecution's submission of its further updated List of Evidence, 24 October 2013, ICC-01/09-01/11-1065-Conf-Anx1-Red.

³ ICC-01/09-01/11-1274-Corr2, filed on 24 April 2014.

⁴ ICC-01/09-01/11-1485-Conf. See: "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, with annexes. On 22 August 2014, a corrigendum was filed as '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', ICC-01/09-01/11-1463-Conf-Corr; 'Addendum to

5. On 12 September, the Prosecution filed another request to add 45 items, relating to Witnesses 516 and 524, to its List of Evidence (the 'Application').⁵ It requested that given the imminent testimony of these two witnesses, the period for the filing of responses be shortened to enable the request to be decided prior to the appearance of the witnesses.⁶
6. On 12 September 2014, the Chamber shortened the time limit for responses to the Application to 16:00 on Wednesday, 17 September 2014.⁷
7. On 16 September 2014, the Chamber granted a supplementary Prosecution application to add 11 items, relating to Witnesses 604 and 495, to its List of Evidence.⁸
8. On 17 September 2014, the defence team for Mr Ruto (the 'Ruto Defence') and the defence team for Mr Sang (the 'Sang Defence') filed their responses to the Application.⁹

II. SUBMISSIONS

Prosecution's submissions

9. The Prosecution seeks to include 45 items on its List of Evidence which relate to Witness 516 and Witness 524, for whom summonses to appear at the September 2014 trial session have been issued. The items include material such as

Prosecution's Corrected version of "Prosecution's eighth application pursuant to Regulation 35(2) of the Regulations of the Court", ICC-01/09-01/11-1474-Conf-Exp, with an annex. A confidential redacted version was filed as ICC-01/09-01/11-1474-Conf-Red.

⁵ Prosecution's Ninth application pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-1511-Conf.

⁶ Application, ICC-01/09-01/11-1511-Conf, para. 7.

⁷ Email from Legal Officer of Trial Chamber V(A) to the parties, 12 September 2014 at 16:22.

⁸ ICC-01/09-01/11-T-137-CONF-ENG ET, page 14, line 1 to page 18, line 4. See: Prosecution's supplementary request to its eighth Application pursuant to Regulation 35(2) of the Regulations of the Court, 11 September 2014, ICC-01/09-01/11-1510-Conf.

⁹ Defence response to the "Prosecution's ninth application pursuant to Regulation 35(2) of the Regulations of the Court", ICC-01/09-01/11-1517-Conf; Sang Defence Response to Prosecution's Ninth Application pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-1518-Conf.

screening notes, transcripts of interviews, reports and other documents related to these two witnesses that were collected in the context of an Article 70 investigation in 2013 and 2014.¹⁰ Accordingly, it is submitted that all but five of the items did not exist when the Prosecution filed its List of Evidence.¹¹ Moreover, the Prosecution's awareness of the witnesses' attempted withdrawal as witnesses and potential hostility took place well after the 9 January 2013 deadline for addition of documents in the List of Evidence.¹²

10. The Prosecution notes that both witnesses have refused to testify voluntarily. The Prosecution states that it has reasonable grounds to believe that this is the result of improper and concerted interference.¹³ The Prosecution thus intends to use these items to: (a) prove that the witnesses were improperly interfered with and as a result they recanted their previous statements and/or withdrew their cooperation with the Prosecution; (b) prove that the interference was part of a wider witness interference scheme; and (c) assist the Chamber with its overall assessment of evidence and in determining matters related to alleged witness corruption.¹⁴ Accordingly, the Prosecution submits that the additional evidence has a contextual bearing and is thus relevant to this case.¹⁵
11. The Prosecution also notes that it cannot rule out that both witnesses may be adverse to the Prosecution, and as such, it may need the additional evidence to put to the witnesses prior conflicting accounts they have provided or to support any application it may make for the admission of prior statements.¹⁶

¹⁰ Application, ICC-01/09-01/11-1511-Conf, paras 1-2.

¹¹ Application, ICC-01/09-01/11-1511-Conf, para. 2.

¹² Application, ICC-01/09-01/11-1511-Conf, paras 30-31.

¹³ Application, ICC-01/09-01/11-1511-Conf, paras 3, 13-28.

¹⁴ Application, ICC-01/09-01/11-1511-Conf, para. 3.

¹⁵ Application, ICC-01/09-01/11-1511-Conf, paras 32-40.

¹⁶ Application, ICC-01/09-01/11-1511-Conf, para. 4.

12. The Prosecution further submits that the addition of these 45 items will not cause unfairness to the Accused, as the bulk of these items have previously been disclosed to the Defence. Moreover, the Defence has been on notice of the Prosecution's intention to rely on these sorts of items since 22 August 2014.¹⁷ The Prosecution however notes that some audio recordings have not yet been disclosed to the defence.¹⁸ The Prosecution also submits that any prejudice is outweighed by the cogency of the information contained in these items, 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.¹⁹ The Prosecution further states that the items do not bring new facts to the charges against the Accused.²⁰

Ruto Defence submissions

13. The Ruto Defence does not oppose the present Application.²¹

Sang Defence submissions

14. The Sang Defence objects to the Application, as it submits the Prosecution has not shown that it was unable to file the Application within the time limit for disclosure (9 January 2013) for reasons outside of its control.²² The Sang Defence argues that some of the items are not relevant pursuant to the Chamber's previous decisions on the matter. Furthermore, the Sang Defence contends that some items were available to the Prosecution prior to the 9 January 2013 deadline. Additionally, the Sang Defence submits that some items were only disclosed to the Defence during the last

¹⁷ Application, ICC-01/09-01/11-1511-Conf, paras 5 and 42.

¹⁸ Application, ICC-01/09-01/11-1511-Conf, para. 44.

¹⁹ Application, ICC-01/09-01/11-1511-Conf, paras 5 and 42.

²⁰ Application, ICC-01/09-01/11-1511-Conf, para. 46.

²¹ ICC-01/09-01/11-1517-Conf, para. 2.

²² ICC-01/09-01/11-1518-Conf, para. 3.

week of August and the first weeks of September 2014, while the audio files related to Witness 516 are yet to be disclosed.²³

15. The Sang Defence makes the following submissions as regards specific items of evidence:

(a) the screening note related to Witness 516 is dated 9 November 2012 and should have been disclosed and included in the List of Evidence before the set deadline and the contents of this item have nothing related to Article 70 investigations that make it relevant;²⁴

(b) the investigator's report related to Witness 516 dated 6 June 2013, relates to incidents that took place prior to 2011 and the Prosecution should not be allowed to include it now in its List of Evidence;²⁵

(c) the investigator report related to Witness 516, dated 27 November 2012, could have been included in the List of Evidence within the set deadline;²⁶

(d) the transcripts of phone calls between Witness 516 and the Prosecution, dated 14 and 17 March 2014, contain no information in respect to Article 70 investigations and are thus not relevant;²⁷ and

(e) the screening note of Witness 524 is dated 19 November 2012 and should have been included in the List of Evidence within the set deadline.²⁸

16. Lastly, the Sang Defence submits that the Prosecution has provided the Chamber with a selective account of its interactions with Witness 524, who has recently

²³ ICC-01/09-01/11-1518-Conf, paras 9-11.

²⁴ ICC-01/09-01/11-1518-Conf, para. 12.

²⁵ ICC-01/09-01/11-1518-Conf, para. 13.

²⁶ ICC-01/09-01/11-1518-Conf, para. 14.

²⁷ ICC-01/09-01/11-1518-Conf, para. 15.

²⁸ ICC-01/09-01/11-1518-Conf, para. 16. *See also* ICC-01/09-01/11-1518-Conf-AnxA.

informed the Prosecution that he is still willing to be interviewed by the Sang Defence on a discrete issue.²⁹

III. ANALYSIS

17. The Chamber recalls its previous ruling that '[a]ny 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 [List of Evidence].'³⁰
18. The Chamber notes that in the 3 September Decision it also concluded that: (a) in view of the allegations of interference, the addition of such items has a contextual or circumstantial bearing, at least, as regards the evidence of witnesses who may have recanted statements previously given to the Prosecution;³¹ (b) applications for the addition of items in the List of Evidence should be made as early as possible in order to enable the Defence to adequately prepare;³² and (c) these applications may be made at a later stage if there are good reasons to do so (these may include when the Prosecution has received information about interference or recantation at a later stage in the proceedings, or when there are risks to ongoing Article 70 investigations if material is disclosed to the Defence at an earlier stage).³³

²⁹ ICC-01/09-01/11-1518-Conf, para. 17.

³⁰ ICC-01/09-01/11-1485-Conf, para.37. See also: 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, para. 89.

³¹ ICC-01/09-01/11-1485-Conf, para. 30.

³² ICC-01/09-01/11-1485-Conf, para. 31.

³³ ICC-01/09-01/11-1485-Conf, para. 33.

19. Accordingly, regarding the 45 items relevant to this Application, the Chamber adopts its prior reasoning that some aspects of the Article 70 allegations are potentially relevant in the present case. Although the Sang Defence submits that certain of the items do not fall within the relevance finding in the 3 September Decision, the Chamber recalls its previous ruling where it determined that an application such as the present one is solely to add items to the Prosecution's List of Evidence and that any admissibility discussion, including regarding alleged relevance, will come at a later time.³⁴
20. In relation to the timing of the application, the Chamber is mindful that, although the Prosecution received a withdrawal affidavit from Witness 524 in August 2013 and Witness 516 ceased contact with the Prosecution in May 2014, it may not have been foreseeable to the Prosecution at that time that the material in question would become relevant to this case.³⁵ The Chamber is thus satisfied that the Prosecution has only recently concluded that it may require the documents to examine these two witnesses. Thus, there are good reasons for applying for addition of documents to the List of Evidence at this point of the proceedings.
21. As regards the potential prejudice that such applications may cause to the Defence, the Chamber has previously determined that the nature and size of the items to be added, and the timing of their original disclosure to the Defence, are relevant considerations.³⁶
22. The Application seeks the addition of the following items related to Witness 516: one screening note (two-pages long), 12 investigators' reports (one to two pages

³⁴ ICC-01/09-01/11-1485-Conf, para. 38. See also: Appeals Chamber, *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3 May 2011, ICC-01/05-01/08-1386, paras 42-26.

³⁵ Application, ICC-01/09-01/11-1511-Conf, para. 31.

³⁶ ICC-01/09-01/11-1485-Conf, paras 34-37.

pages long), seven transcripts of recordings (between two-seven pages long), and seven audio recordings (which are divided into 12 excerpts attached to Annex C of the Application). Most items are dated 2014.³⁷

23. In relation to Witness 524, the Application seeks the addition of the following items: one statement (eight pages long), one screening note (two pages long), 12 investigator's reports (one to three pages long), three letters allegedly from Witness 524 (two pages long), and one affidavit allegedly from Witness 524 (one page long). The items are dated 2013 or 2014.³⁸
24. The Chamber observes that the items are concise and because of their nature, should not unduly burden the Defence in their preparation for the upcoming testimony the witnesses concerned. The Chamber notes that, except for the audio recordings related to Witness 516, all other items have already been disclosed to the Defence, albeit some of them very recently. Although the Chamber recognises that the specific question of disclosure of underlying audio recordings of this nature was only ruled on recently, it notes that disclosure to the Defence should take place prior to their potential use during the examination of Witness 516, and in no case later than 24 hours before his testimony. With that caveat, the Chamber considers that the addition of these items to the List of Evidence does not unduly prejudice the Accused.

³⁷ Application, ICC-01/09-01/11-1511-Conf-AnxB and AnxC1-C12.

³⁸ Application, ICC-01/09-01/11-1511-Conf-AnxD.

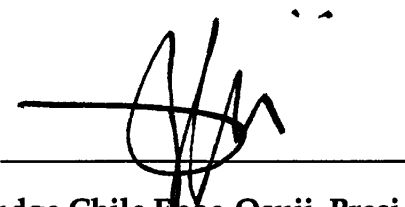
FOR THE FOREGOING REASONS THE CHAMBER HEREBY

GRANTS the relief sought in the Application;

DIRECTS the Prosecution to update its List of Evidence for ease of reference and file it into the record of the case forthwith;

DIRECTS the Prosecution to submit any application for addition of items to the List of Evidence it considers necessary for Witness 323, no later than 16.00 on 22 September 2014, and for any other upcoming witness, no later than 15 October 2014.

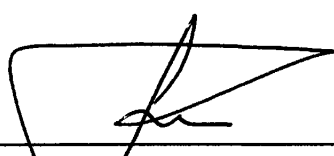
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 19 September 2014

At The Hague, The Netherlands