

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 26 September 2014

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***

Confidential

**Decision on the Prosecution's Tenth 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

Ms Fatou Bensouda

Mr James Stewart

Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan

Mr David Hooper

Ms Shyamala Alagendra

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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 Tenth 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 several witnesses to testify 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 Witness 604 and Witness 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 16 September 2014, the Chamber granted a supplementary Prosecution application to add 11 items, relating to Witness 604 and Witness 495, to its List of Evidence.⁵
6. On 19 September 2014, the Chamber granted another Prosecution application to add 45 items to its List of Evidence related to Witness 516 and Witness 524.⁶ In that same decision, the Chamber instructed the Prosecution to submit any application for addition of items to its List of Evidence it considers necessary for the witness concerned by the current Decision, no later than 16.00 on 22 September 2014.⁷
7. On 22 September 2014, the Prosecution filed its application to add 38 items to its List of Evidence (the 'Application').⁸
8. On 23 September 2014, the Chamber shortened the time limit for responses to the Application to 12:00 on Thursday, 25 September 2014.⁹
9. On 24 September 2014, the defence team for Mr Ruto (the 'Ruto Defence') filed its response to the Application.¹⁰
10. On 25 September 2014, the defence team for Mr Sang (the 'Sang Defence') filed its response to the Application.¹¹

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 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.

⁶ Decision on the Prosecution's Ninth Application for Addition of Documents to Its List of Evidence, ICC-01/09-01/11-1527-Conf.

⁷ ICC-01/09-01/11-1527-Conf, page 11.

⁸ Prosecution's tenth application pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-1532-Conf, Conf-AnxsA+B, Conf-Exp-AnxC and Conf-Exp-AnxsD1-D28.

⁹ Email from Legal Officer of Trial Chamber V(A) to the parties, 22 September 2014 at 11:43.

¹⁰ Defence response to the "Prosecution's tenth application pursuant to Regulation 35(2) of the Regulations of the Court", ICC-01/09-01/11-1542-Conf.

¹¹ Sang Defence Response to Prosecution's Ninth Application pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-1548-Conf.

II. SUBMISSIONS

11. The Prosecution seeks to include 38 items on its List of Evidence which relate to an upcoming witness, for whom summons to appear at the September 2014 trial session have been issued. The items include material such as screening notes, reports and other documents related to this witness that were collected in the context of an Article 70 investigation in 2013 and 2014, as well as audio files of the witness's interview with the Prosecution in 2012.¹² Accordingly, it is submitted that the bulk of the items did not exist when the Prosecution filed its List of Evidence.¹³ Moreover, the Prosecution states that its 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.¹⁴
12. The Prosecution notes that the witness has refused to testify voluntarily. The Prosecution states that it has reasonable grounds to believe that this is the result of improper interference.¹⁵ The Prosecution thus intends to use these items to: (a) prove that the witness was improperly interfered with and as a result he recanted his previous statement and withdrew his 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.¹⁶ Accordingly, the Prosecution submits that the additional evidence has a contextual bearing and is relevant to this case.¹⁷

¹² Application, ICC-01/09-01/11-1532-Conf, para. 1.

¹³ Application, ICC-01/09-01/11-1532-Conf, para. 2.

¹⁴ Application, ICC-01/09-01/11-1532-Conf, para. 19.

¹⁵ Application, ICC-01/09-01/11-1532-Conf, para. 3.

¹⁶ Application, ICC-01/09-01/11-1532-Conf, para. 3.

¹⁷ Application, ICC-01/09-01/11-1532-Conf, paras 21-25.

13. The Prosecution also notes that it cannot rule out that the witness may be adverse to the Prosecution, and as such, it may need the additional evidence to put to the witness prior conflicting accounts he has provided or to support any application it may make for the admission of prior statements.¹⁸
14. Additionally, the Prosecution submits that this additional evidence will be relevant to the Chamber's determination of a contemplated Prosecution request to admit prior statements of one or more witnesses.¹⁹
15. The Prosecution further submits that the addition of these 38 items will not cause unfair prejudice 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 2014.²⁰ Although the Prosecution notes that some audio recordings have just recently been disclosed on 19 September 2014, the Defence has been in possession of the verbatim transcripts since January 2013.²¹ 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 this witness and to ensure that the Chamber has before it necessary evidence for the determination of the truth.²² The Prosecution further states that the items do not bring new facts to the charges against the Accused.²³
16. The Ruto Defence and the Sang Defence do not oppose the Application.²⁴

¹⁸ Application, ICC-01/09-01/11-1532-Conf, para. 4.

¹⁹ Application, ICC-01/09-01/11-1532-Conf, para. 22.

²⁰ Application, ICC-01/09-01/11-1532-Conf, paras 5 and 27.

²¹ Application, ICC-01/09-01/11-1532-Conf, para. 30.

²² Application, ICC-01/09-01/11-1532-Conf, paras 5 and 18.

²³ Application, ICC-01/09-01/11-1532-Conf, para. 29.

²⁴ ICC-01/09-01/11-1542-Conf, para. 2; ICC-01/09-01/11-1548-Conf, para.4.

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].'²⁵
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;²⁶ (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;²⁷ 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).²⁸
19. Accordingly, regarding the 38 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. The Chamber recalls its previous ruling where it determined that an application such as the present one is solely to add

²⁵ 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.

²⁶ ICC-01/09-01/11-1485-Conf, para. 30.

²⁷ ICC-01/09-01/11-1485-Conf, para. 31.

²⁸ ICC-01/09-01/11-1485-Conf, para. 33.

items to the Prosecution's List of Evidence and that any admissibility discussion, including regarding alleged relevance, will come at a later time.²⁹

20. In relation to the timing of the application, the Chamber is mindful that, although the Prosecution received a withdrawal affidavit from the witness concerned on 25 February 2014, it may not have been foreseeable to the Prosecution at that time that the material in question would become relevant to this case.³⁰ The Chamber is thus satisfied that the Prosecution has only recently concluded that it may require the documents to examine this witness. 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.³¹
22. The Application seeks the addition of the following items: one screening note (three-pages long), one affidavit (three-pages long), one video (together with its transcript and translation), five investigator's reports (two to three-pages long), and 28 audio files of the Prosecution's interview with the witness. Most items are dated 2012-2014.³²
23. 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 witness. The Chamber notes that all items have already been

²⁹ 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.

³⁰ Application, ICC-01/09-01/11-1532-Conf, paras 17-20.

³¹ ICC-01/09-01/11-1485-Conf, paras 34-37.

³² Application, ICC-01/09-01/11-1532-Conf-AnxB, AnxC and Anx D1-D28.

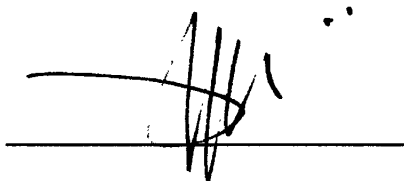
disclosed to the Defence, albeit some of them, specifically the audio files, very recently. The Chamber thus considers that the addition of these items to the List of Evidence does not unduly prejudice the Accused.

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;

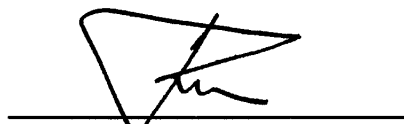
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 26 September 2014

At The Hague, The Netherlands