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No.: ICC-01/09-01/11
Date: 30 October 2014

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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**

PUBLIC

**with Confidential, *EX PARTE*, only available to the Prosecution and VWU
Annexes A-M and Confidential Annex N**

**Public redacted version of "Prosecution's eleventh application pursuant to
Regulation 35(2) of the Regulations of the Court"
15 October 2014, ICC-01/09-01/11-1606-Conf**

Source: Office of the Prosecutor

Document 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 the Defence

For William Samoei Ruto:

Mr Karim Khan
Mr David Hooper
Ms Shyamala Alagendra

For Joshua Arap Sang:

Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

Legal Representatives of the Victims

Mr Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Deputy Registrar

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Introduction

1. The Office of the Prosecutor (“OTP” or “Prosecution”) requests the authorisation of Trial Chamber V(A) (“Chamber”) to include 539 further items on its List of Evidence (“LoE”) pursuant to Regulation 35(2) of the Regulations of the Court (“RoC”) and Articles 64(6)(d) and 69(3) of the Rome Statute (the “Application”), as listed in Annex N. The 539 items relate to witnesses P-0015, P-0016, P-0019, P-0028, P-0336 and P-0397 and consist of previously (or soon to be¹) disclosed items of evidence such as screening notes, transcripts of interviews, reports and other documents relating to these witnesses. Included in the 539 items is one further document pertaining to witness P-0524, which the Prosecution only received on 13 October 2014.
2. For the reasons more fully explained below, these items are now assessed to be relevant to the evidence of witnesses P-0015, P-0016, P-0019, P-0028, P-0336, P-0397 and P-0524. The Chamber has determined that summonses to appear ought to be issued for P-0015, P-0016, P-0336 P-0397 and P-0524.² [REDACTED].³ Although witnesses P-0019 and P-0028 are not the subject of summons proceedings [REDACTED].⁴
3. Common to all seven witnesses, however, is that they have at one time or another withdrawn their cooperation with the Prosecution and thus it cannot be ruled out that, once before the Court, these witnesses will provide testimony that is adverse to the Prosecution. As such, the Prosecution may need to put to them prior conflicting accounts they have provided regarding the PEV. This concern has previously been raised by the Prosecution and the last four witnesses that have testified in this case were in fact declared hostile. At a later date the Prosecution will submit that improper influence was the reason for this hostility.

¹ 76 audio recordings related to witnesses P-0016, P-0028, P-0336 and P-0397 have not yet been disclosed to the Defence, for reasons set out below. However the Defence have received disclosure of the transcripts of these recordings. The Prosecution is currently preparing the audio materials for disclosure on an urgent basis and once any necessary redactions have been applied, will disclose them at the earliest opportunity. See paragraph 80 below.

² As recently upheld by the Appeals Chamber; see ICC-01/09-01/11-1598 OA7.

³ [REDACTED].

⁴ [REDACTED].

However, in order to support any such submission, it will be necessary to elicit relevant evidence while those witnesses are on the stand, and/or alternatively to confront the witnesses with such evidence should they prove to be hostile. Thus, the Prosecution files this Application to include on its LoE the materials listed in Annex N.

4. The Prosecution submits that the addition of these 539 items will not cause unfair prejudice to the Accused, as the bulk of the materials have previously been disclosed to the Defence as either Rule 77 material or as potentially exonerating material.⁵ All items previously disclosed as Rule 77 material or as potentially exonerating material were re-disclosed as incriminating evidence. Those with previous redactions to the targets of the Article 70 investigation have been re-disclosed with the redactions lifted. Transcripts, translations and/or statements relating to all audio material have been disclosed. The Prosecution now seeks to add the audio material in light of the Chamber's Oral Ruling on 10 September 2014.⁶
5. Any prejudice to the Defence 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. Further, [REDACTED],⁷ [REDACTED], the addition of these items to the LoE is without prejudice to the Chamber's discretion to admit the said evidence in the record of the proceedings.⁸

Confidentiality

6. The Prosecution submits this Application and Annex N as Confidential, as they contain personal and identifying information related to the witnesses which must

⁵ See Annex N for details relating to the disclosure dates of all items in Annexes A-M.

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

remain concealed from the public. Annexes A-M are submitted as confidential *ex parte* as they contain full non-redacted versions of the materials which are the subject of this Application. Save for the material related to [REDACTED] and the yet-to-be-disclosed audio recordings, the Defence have access to all of these items *via* the Ringtail database. A public redacted version of this Application will also be filed in due course.

Urgency

7. [REDACTED].⁹ The Prosecution respectfully requests that the period for the filing of responses to this Application be shortened to enable the request to be decided prior to the appearance of the witnesses.

Statement of facts

8. 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 LoE by 9 January 2013.¹⁰
9. On 5 December 2013, the Prosecution filed its Request under Article 64(6)(b) and Article 93 of the Rome Statute (“Statute”) to summon witnesses (“Summons Request”).¹¹
10. On 29 April 2014, the Chamber issued its “Decision on Summons and Request for State Cooperation” (“Summons Decision”), wherein it ordered, *inter alia*, a summons to be issued for P-0015, P-0016, P-0336, P-0397 and P-524 to appear as witnesses in this case.¹²

⁹ [REDACTED].

¹⁰ ICC-01/09-01/11-440, para.13.

¹¹ Corrected and amended version of “Prosecution’s request under article 64(6)(b) and article 93 to summon witnesses” (ICC-01/09-01/11-1120-Conf-Exp), ICC-01/09-01/11-1120-Conf-Red-Corr2.

¹² ICC-01/09-01/11-1274-Corr2.

11. The Prosecution previously filed applications to add items to its LoE on 22 August,¹³ 29 August,¹⁴ 11 September,¹⁵ 12 September,¹⁶ and 22 September 2014.¹⁷
12. On 3 September 2014, the Chamber issued a decision [REDACTED].¹⁸ On 16 September 2014, the Chamber granted a supplementary request [REDACTED] (“16 September Oral Ruling”).¹⁹
13. On 10 September 2014, the Chamber issued an oral ruling with respect to P-0604 [REDACTED].²⁰
14. On 19 September 2014, the Chamber [REDACTED]²¹ (“19 September Decision”).
15. On 26 September 2014, the Chamber [REDACTED] (“26 September Decision”).²²
16. On 9 October 2014, the Appeals Chamber upheld the Summons Decision.²³

P-0015

17. P-0015’s identity and statements were disclosed to the Defence on 18 February 2013.
18. P-0015’s withdrawal of cooperation and the circumstances surrounding the recantation of his prior statements to the Prosecution are set out in the Prosecution’s Summons Request.²⁴ The Prosecution hereby incorporates the relevant paragraphs and relies on the facts set out therein.

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ ICC-01/09-01/11-1598 OA7.

²⁴ Summons Request, paras.8-18.

P-0016

19. P-0016's identity and statements were disclosed to the Defence on 11 February 2013. The Prosecution incorporates by reference its submissions in paragraphs 19-29 of its Summons Request for background purposes regarding P-0016's previous withdrawal of cooperation with the Prosecution.²⁵
20. [REDACTED].
21. [REDACTED].²⁶
22. [REDACTED],²⁷ [REDACTED]²⁸ [REDACTED],²⁹ [REDACTED].³⁰ [REDACTED].
23. [REDACTED],³¹ [REDACTED].³²

P-0019

24. P-0019's identity and lesser redacted statements were disclosed to the Defence on 9 January 2013.
25. P-0019 and his family have been receiving threats due to his cooperation with the ICC since 2009.³³ [REDACTED].
26. [REDACTED].³⁴ [REDACTED].³⁵
27. The Prosecution has not received a withdrawal affidavit from P-0019, but cooperation with him has been marred by his reluctance to testify, in particular due to recurring threats and intimidation as a result of his assistance to the Court in this case.

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

28. In March 2014, P-0019 withdrew his cooperation with the OTP as he said testifying would be “too dangerous”.³⁶ [REDACTED].³⁷

P-0028

29. P-0028’s identity and lesser redacted statements were disclosed to the Defence on 9 January 2013.
30. P-0028 was first contacted by the Prosecution on [REDACTED] and from very early on, has expressed grave fears for his safety and that of his family due to his cooperation with the ICC. On [REDACTED], P-0028 told the Prosecution of threats he had been subjected to by persons closely associated to the Accused Mr Ruto due to having provided evidence unfavourable to Mr Ruto [REDACTED].³⁸
31. [REDACTED].³⁹
32. [REDACTED].⁴⁰
33. [REDACTED].⁴¹
34. In January 2013, P-0028 reiterated his fear for the safety of his family [REDACTED].⁴² [REDACTED].⁴³
35. Throughout 2013 and 2014, P-0028 has shifted from agreeing to cooperate as a witness, to withdrawing his cooperation, to once again agreeing to testify voluntarily. [REDACTED].⁴⁴ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

P-0336

36. P-0336's identity and statements were first disclosed to the Defence on 11 February 2013. With respect to P-0336's background until November 2013, the Prosecution incorporates by reference its submissions in its Summons Request, paragraphs 30-37.⁴⁵
37. [REDACTED],⁴⁶ the Prosecution was finally able to secure a meeting, and conduct an Article 55(2) interview with the witness on [REDACTED], wherein he explained, *inter alia*, the reasons for his withdrawal as a witness, [REDACTED].⁴⁷ The Prosecution conducted a further follow-up interview in the same vein on [REDACTED].⁴⁸
38. The Prosecution then lost contact with P-0336 [REDACTED].⁴⁹ [REDACTED] and once again ceased communication with the Prosecution.
39. [REDACTED].⁵⁰
40. [REDACTED],⁵¹ [REDACTED],⁵² [REDACTED].⁵³

P-0397

41. P-0397's redacted statement was first disclosed to the Defence on 30 November 2012. B.1 redactions were lifted and his identity was disclosed on 18 February 2013.
42. P-0397's withdrawal of cooperation and the circumstances surrounding the recantation of his prior statement to the Prosecution are set out in the Summons Request.⁵⁴

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

43. On [REDACTED], P-0397 confirmed that he was being harassed and threatened as a result of being an ICC witness. [REDACTED].⁵⁵

44. [REDACTED].⁵⁶

P-0524

45. P-0524's withdrawal of cooperation and the circumstances surrounding the recantation of his prior statement to the Prosecution are set out in the Summons Request.⁵⁷ [REDACTED]⁵⁸ [REDACTED].⁵⁹

46. [REDACTED].⁶⁰ [REDACTED].⁶¹ [REDACTED].⁶²

Submissions

Variation of the time and authorisation to disclose further evidence

47. The overarching objective of a trial is a fair proceeding at which the truth is established. The 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 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 RoC: "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."

⁵⁴ Summons Request, paras.38-43.

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ ICC-01/09-01/11-1120, paras. 49-55.

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

48. This Application is filed after the 9 January 2013 deadline to file the Prosecution's LoE because the relevant events concerning the proposed additional evidence and/or the Prosecution's awareness of the witnesses' withdrawal and potential hostility took place well after the 9 January 2013 deadline. The items that originate from *before* 9 January 2013 are limited to: (a) audio recordings of interviews, the transcripts of which were included in the LoE filed on 9 January 2013, (b) screening notes (or audio recordings/transcripts/translations of such), and (c) Investigator Reports of threats or security breaches reported by witnesses.
49. The Prosecution was not aware that these items would need to be added to its LoE until recently. With respect to the audio recordings, [REDACTED].⁶³ [REDACTED].⁶⁴ With respect to the screening notes and Investigator Reports detailing threats and security breaches, the Prosecution was not in a position to ascertain that it would need these items to confront potentially adverse witnesses until it became aware of the full extent of the witness interference scheme. [REDACTED].⁶⁵ It was not until recently that it came to light that the Prosecution would require the items listed in Annex N, something that was confirmed by the adverse nature of the last four witnesses to appear at trial.
50. The Prosecution has received withdrawal affidavits from witnesses P-0015, P-0016, P-0336, P-0397 and, to certain extent, from P-0524. [REDACTED], the Prosecution has in its possession evidence that he has previously been improperly interfered with and cannot exclude the possibility that he may prove to be hostile once on the witness stand. [REDACTED]. Although no affidavits of withdrawal have been received from [REDACTED], the Prosecution cannot rule out that they have been improperly interfered with. It is only in light of the findings of the Article 70 investigation over the course of the last year and the pattern of witness interference and recantation that has emerged, that the Prosecution concluded that it may require the materials which are the subject of

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

this Application when examining⁶⁶ these witnesses. On this basis, the Prosecution submits it has shown good cause for the Chamber to exercise its discretion to vary the 9 January 2013 deadline and allow the Prosecution to add the items listed in Annex N to its LoE.

Relevance of the items

51. In its 3 September 2014 Decision, the Chamber noted that [REDACTED].⁶⁷ The Chamber reiterated this finding in its 19 September 2014 Decision [REDACTED].⁶⁸ The present Application does not go beyond this principle – the request is to simply add the items to the LoE, with a determination on admissibility to follow at the appropriate time. Indeed, the type and nature of the items the Prosecution requests to add to its LoE in this Application are the same as those that were the subject of its previous Applications, which the Chamber granted.
52. The Chamber, in its quest for the determination of the truth, must have before it *all* relevant evidence. The Prosecution submits that the documents in Annex N 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. The additional evidence will also be relevant to the Chamber's determination of a contemplated Prosecution request to admit prior statements of one or more of these witnesses pursuant to Article 69 of the Statute and/or Rule 68 of the Rules of Procedure and Evidence.

⁶⁶ Or cross examining, as the case may be.

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

Relevance of additional documents related to P-0015 (Annexes A and B1-B60)

53. The Prosecution requests permission to add to its LoE: (a) an email, letters and an affidavit purportedly deposited to by P-0015 received from [REDACTED] in February 2013;⁶⁹ (b) the audio recordings, transcripts and annexes from the Prosecution's [REDACTED] interview with P-0015;⁷⁰ (c) an email, letters and affidavits purportedly deposited to by P-0015, [REDACTED] received from [REDACTED] in March 2013;⁷¹ (d) the Investigator Report of the Prosecution's conversations and contacts with P-0015 in [REDACTED];⁷² (e) the attachments to [REDACTED] press release;⁷³ (f) the video, transcript and translation containing an interview with P-0015 (and P-0016);⁷⁴ (g) the affidavit and related materials submitted in support of the national proceedings regarding Walter Barasa;⁷⁵ (h) three prior statements, and two transcripts of prior statement already on the LoE, [REDACTED];⁷⁶ (i) the audio recordings and transcripts of the witness' screening;⁷⁷ (j) the audio recordings and transcripts of the Prosecution's security discussions with the witness;⁷⁸ (k) seven waivers of rights connected to the Prosecution's interviews with the witness;⁷⁹ (l) two Investigator Reports;⁸⁰ (m) two media articles;⁸¹ and (n) 39 audio recordings of the Prosecution's 2010 and 2011 interviews with P-0015.⁸²
54. The 99 items consist of previously disclosed items of evidence that the Prosecution intends to lead P-0015 on, or alternatively, confront him with during his examination. The Prosecution has reasonable grounds to believe that the withdrawal and recantation of this witness have been materially affected by

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ [REDACTED].

⁸² [REDACTED].

improper interference. The Prosecution intends to use this evidence (a) to prove that P-0015 was improperly interfered with and as such recanted his prior statements and withdrew his cooperation with the Prosecution; (b) to prove that this interference 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.

55. The Prosecution can also not rule out that P-0015 may be adverse to the Prosecution, and as such, may need to put to him prior conflicting accounts he has provided regarding the PEV. In this regard, as noted above, the Prosecution has received a number of affidavits purportedly deposed to by P-0015 withdrawing his cooperation, recanting his earlier statements, and levelling allegations of improper conduct against the OTP. In such a scenario, the audio files of his 2010 and 2011 interviews, the information he gave the Prosecution during his screening before being interviewed, the information he provided during security discussions and the various prior statements he has made to other organisations and the media may be necessary to confront the witness and to assess the veracity of his testimony.

Relevance of additional documents related to P-0016 (Annexes C and D1-D73)

56. The Prosecution requests permission to add to its LoE: (a) a screening note relating to P-0016,⁸³ (b) 32 transcribed statements, related materials and a witness statement collected in the context of the Prosecution's Article 70 investigations,⁸⁴ (c) 40 audio recordings of OTP interviews with P-0016,⁸⁵ (d) seven annexes to various statements and related material,⁸⁶ (e) correspondence emanating from P-0016,⁸⁷ (f) 20 Investigator Notes or Reports,⁸⁸ (g) four ICC administrative

⁸³ [REDACTED].

⁸⁴ [REDACTED].

⁸⁵ [REDACTED].

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ [REDACTED].

documents,⁸⁹ (h) two identifying documents,⁹⁰ (i) the video, transcript and translation containing an interview with P-0016 (and P-0015),⁹¹ (j) a media report,⁹² (k) two recanting affidavits purportedly deposed to by P-0016,⁹³ (l) a non-ICC statement from P-0016,⁹⁴ and (m) two court documents and their translations.⁹⁵

57. Until his recantation in September 2013, P-0016 had been consistent in the evidence he gave to the OTP regarding the PEV. [REDACTED]. The Prosecution intends to use the items listed in Annexes C and D to demonstrate that P-0016's recantation is attributable to the pressures exerted on him [REDACTED]. In addition, the Prosecution will use the material to show the existence of a wider scheme of witness interference, including interference specifically with witnesses [REDACTED].

58. [REDACTED].

Relevance of additional documents related to P-0019 (Annexes E and F1-F14)

59. The Prosecution requests permission to add to its LoE: (a) a screening note relating to P-0019;⁹⁶ (b) 14 audio recordings of P-0019's interview;⁹⁷ (c) seven Investigator Reports;⁹⁸ (d) two prior statements of P-0019,⁹⁹ (e) five media reports and forum posts;¹⁰⁰ and (f) four items resulting from [REDACTED].¹⁰¹

60. Although the Prosecution has not received a withdrawal affidavit from P-0019, it cannot rule out that he has been improperly interfered with or that his anticipated testimony, once he appears in court, will change as the result of

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

⁹¹ [REDACTED].

⁹² [REDACTED].

⁹³ [REDACTED].

⁹⁴ [REDACTED].

⁹⁵ [REDACTED].

⁹⁶ [REDACTED].

⁹⁷ [REDACTED].

⁹⁸ [REDACTED].

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [REDACTED].

improper influence. The Investigator Reports, articles and forum posts speak to numerous attempts to intimidate, reveal the identity of and corruptly influence P-0019, as well as members of his family.

61. At present, P-0019 is not cooperative and refuses to appear as a witness voluntarily, and the Prosecution is mindful of the fact that he may turn hostile. If this is the case, the Prosecution intends to confront the witness with his prior statements and/or the audio files of his interviews.
62. [REDACTED]. If necessary, this material will be used to demonstrate the existence of a wider scheme of witness interference involving P-0019 and other trial witnesses.

Relevance of additional documents related to P-0028 (Annexes G and H1-H66)

63. The Prosecution requests permission to add to its LoE: (a) a screening note and transcript of a screening relating to P-0028;¹⁰² (b) three transcripts of security-related conversations between the OTP and P-0028;¹⁰³ (c) 11 administrative documents relating to P-0028's interviews with the OTP;¹⁰⁴ (d) 18 Investigator Reports;¹⁰⁵ and (e) 53 audio recordings of the OTP's interviews with P-0028.¹⁰⁶
64. Although the Prosecution has not received a withdrawal affidavit from P-0028, [REDACTED]. As outlined in paragraphs 30-34 above and evident from the material in Annex G, P-0028 has reiterated that the safety of his family [REDACTED] has been compromised due to his collaboration with the ICC. [REDACTED].
65. The 53 audio materials appended in Annexes H1 – H66 are recordings of the OTP's interviews, screening and security-related conversations with witness P-

¹⁰² [REDACTED].

¹⁰³ [REDACTED].

¹⁰⁴ Consisting of notes taken by the witness, signed waiver of rights and acknowledgments of receipt of interview recordings. [REDACTED].

¹⁰⁵ [REDACTED].

¹⁰⁶ [REDACTED].

0028. The transcripts and/or translations for all but four of these recordings¹⁰⁷ have been disclosed to the Defence. Those four comprise of three audio recordings of security-related interviews, and an audio-recorded screening the Prosecution conducted with P-0028 on [REDACTED]. For these four recordings, transcripts and translations were only disclosed on 15 October 2014, however, the Prosecution long ago disclosed Investigator Reports and a Screening Note which captured all disclosable information within the security-related conversations and screening.¹⁰⁸ The audio recordings themselves will be disclosed (or re-disclosed as the case may be) to the Defence on a rolling basis as soon as possible, but in any event by no later than 31 October 2014.¹⁰⁹

Relevance of additional documents related to P-0336 (Annexes I and J1-J54)

66. The Prosecution requests permission to add to its LoE: (a) a screening note relating to P-0336;¹¹⁰ (b) six statements, their annexes¹¹¹ and 22 transcripts of interviews conducted with P-0336 in the context of the Prosecution's Article 70 investigation;¹¹² together with the corresponding audio recordings of those interviews;¹¹³ (c) audio recordings of conversations featuring P-0336¹¹⁴ and their corresponding transcripts and translations;¹¹⁵ (d) three administrative documents;¹¹⁶ (e) 27 Investigator and other Reports;¹¹⁷ and (f) two recanting affidavits.¹¹⁸

¹⁰⁷ [REDACTED].

¹⁰⁸ [REDACTED].

¹⁰⁹ In light of the Chamber's Oral Decision of 10 September 2014 [REDACTED], the Prosecution has endeavoured to disclose all audio to the Defence and thus seeks to add this material to its LoE. However, nearly all the material requires some (generally minimal and pre-approved) redactions. The Prosecution is in the process of applying those redactions to audio, but it is a technical process which takes time. Therefore, the bulk of the audio material relating to P-0028 will be disclosed after this Application is filed, but by no later than 31 October 2014 and well before the appearance of P-0028 at trial.

¹¹⁰ [REDACTED].

¹¹¹ [REDACTED].

¹¹² [REDACTED].

¹¹³ [REDACTED].

¹¹⁴ [REDACTED].

¹¹⁵ [REDACTED].

¹¹⁶ [REDACTED].

¹¹⁷ [REDACTED].

¹¹⁸ [REDACTED].

67. [REDACTED],¹¹⁹ [REDACTED].¹²⁰ [REDACTED].¹²¹ [REDACTED].¹²²
[REDACTED].
68. In addition, P-0336 provides information regarding a broader witness interference scheme, which has targeted other Prosecution witnesses. He provides information which shows direct interference with witnesses [REDACTED] who the Prosecution submits have all been improperly approached and who have subsequently become involved in the witness interference scheme. [REDACTED].¹²³ [REDACTED],¹²⁴ [REDACTED].¹²⁵ The Prosecution submits this information is highly relevant to the current proceedings and warrants inclusion of these documents in the LoE.
69. [REDACTED]. For this reason, the Prosecution seeks to include the screening note provided by P-0336 in its LoE. In addition, the Prosecution intends to use the Investigator Reports to show the consistent and on-going threats to P-0336's security since his contact with the OTP. [REDACTED].¹²⁶
70. Although not all the audio materials have been disclosed to the Defence, the Defence do have transcripts and/or translations of those materials. The Prosecution endeavours to disclose the audio material on a rolling basis as soon as possible, and in any event, no later than 31 October 2014.¹²⁷

¹¹⁹ [REDACTED].

¹²⁰ [REDACTED].

¹²¹ [REDACTED].

¹²² [REDACTED].

¹²³ [REDACTED].

¹²⁴ [REDACTED].

¹²⁵ [REDACTED].

¹²⁶ [REDACTED].

¹²⁷ The Prosecution is in the process of applying (generally minimal and pre-approved) redactions to audio material relating to P-0336 which has not previously been disclosed, but it is a technical process which takes time. Therefore, the bulk of the audio material relating to P-0336 will be disclosed after this Application is filed, but by no later than 31 October 2014 and well before the appearance of P-0336 at trial.

Relevance of additional documents related to P-0397 (Annexes K and L1-L101)

71. The Prosecution requests permission to add to its LoE: (a) a screening note relating to P-0397;¹²⁸ (b) 29 Investigator Reports;¹²⁹ (c) three correspondences;¹³⁰ (d) a purported affidavit of P-0397 with cover letters;¹³¹ (e) a report [REDACTED];¹³² (f) waiver signed by P-0397 consenting to be interviewed by ICC Investigators;¹³³ (g) [REDACTED];¹³⁴ (h) audio and transcript of interview of P-0397 by ICC Investigators;¹³⁵ (i) audio recordings of conversations and their corresponding transcripts;¹³⁶ (j) three general witness statements from [REDACTED];¹³⁷ (k) two solemn declarations;¹³⁸ (l) external reports or correspondence;¹³⁹ and (m) four cover sheet of CDs and photograph of physical evidence which the Prosecution may rely on.¹⁴⁰
72. The screening note is relevant to these proceedings as it establishes the consistency of P-0397's anticipated testimony in the event that an alternate version is given by him. The Prosecution cannot rule out that P-0397 may be adverse to the Prosecution and may need to confront him with his prior statements if that situation were to arise.
73. [REDACTED]. If the witness is successfully compelled and he appears and gives evidence contrary to his statement, these would be relevant to establish interference [REDACTED]. Alternatively, these documents may be relevant for the purposes of a Rule 68 application, if the witness is not located.

¹²⁸ [REDACTED].

¹²⁹ [REDACTED].

¹³⁰ [REDACTED].

¹³¹ [REDACTED].

¹³² [REDACTED].

¹³³ [REDACTED].

¹³⁴ [REDACTED].

¹³⁵ [REDACTED].

¹³⁶ [REDACTED].

¹³⁷ [REDACTED].

¹³⁸ [REDACTED].

¹³⁹ [REDACTED].

¹⁴⁰ [REDACTED].

74. In May 2013, P-0397 purportedly submitted an affidavit wherein he stated that he no longer wished to testify for the Prosecution and withdrew his statement which implicates the Accused. The Prosecution has reason to believe that his recantation was brought about by improper interference by persons intent on derailing the current trial, and will use the affidavit along with supporting correspondence in order to show this.
75. The Prosecution conducted an interview with P-0397 pursuant to Article 55(2) of the Statute [REDACTED], collected other documents and [REDACTED].¹⁴¹ These items are relevant in showing that P-0397 was subjected to interference and also demonstrate a wider scheme of witness interference. They also establish possible motives for this witness recanting his initial statement. [REDACTED].¹⁴² Given the Chamber's deadline for any application for the addition of further witness-related materials to its LoE, the Prosecution seeks to include these items on its LoE [REDACTED].

One additional document related to witness P-0524 (Annex M)

76. The Prosecution seeks to include in its LoE one further document relating to witness P-0524. The Prosecution incorporates by reference its submissions with respect to P-0524 in its Ninth Application.¹⁴³ [REDACTED]. A courtesy copy of the communication was provided to the Defence on 13 October and was formally disclosed on 15 October.¹⁴⁴

Addition of items to the LoE is not prejudicial to the Accused

77. The Prosecution submits that the addition of the 539 items is not prejudicial to the Accused for a number of reasons. All of the items have been (or soon will be) disclosed to the Defence with sufficient notice prior to the witnesses' appearance

¹⁴¹ [REDACTED].

¹⁴² [REDACTED].

¹⁴³ [REDACTED].

¹⁴⁴ [REDACTED].

at trial.¹⁴⁵ All of the redactions previously applied to the targets of the Prosecution's Article 70 investigation have also now been lifted.

78. Further, the Defence teams have been on notice of the Prosecution's intention to rely on these sorts of items since 22 August 2014 when the Prosecution filed its application in respect of P-0604 and P-0495, indicating that it intended to file a similar application in respect of the remaining summonsed witnesses at the earliest opportunity.¹⁴⁶ Indeed, the Chamber set a deadline for the Prosecution to seek inclusion of any further material on its LoE relating to the remaining trial witnesses by 15 October 2014.¹⁴⁷
79. [REDACTED].¹⁴⁸ Whether the Prosecution is permitted to use these items, and if so, in what manner, will be determined at a later time.
80. With respect to the audio material being recently disclosed for the first time (or being disclosed imminently), the Prosecution recalls that Chamber's oral ruling [REDACTED].¹⁴⁹ In line with this ruling, the Prosecution has undertaken to disclose all audio material relating to the six witnesses at the subject of this Application so it does not find itself in the same situation in the future. [REDACTED].¹⁵⁰ With respect to the six witnesses who are the subject of this application, the Prosecution has already disclosed 112 recordings by 15 October 2014 and undertakes to disclose the remaining 76 recordings by 31 October 2014, once redactions to the audio have been finalised.¹⁵¹ Disclosure will take place on a rolling basis as soon as materials are processed. [REDACTED].
81. The items do not bring new facts to the matters charged in the Prosecution's Document Containing the Charges, but as outlined above, provide information

¹⁴⁵ The Prosecution appends a table in Annex N which indicates when the items that the Prosecution seeks to add to its LoE were first disclosed to the Defence.

¹⁴⁶ [REDACTED].

¹⁴⁷ [REDACTED].

¹⁴⁸ [REDACTED].

¹⁴⁹ [REDACTED].

¹⁵⁰ [REDACTED].

¹⁵¹ See Annex N.

with respect to interference that the Prosecution contends the witnesses have been exposed to.

Relief requested

82. The Prosecution requests the following relief:

- (a) Pursuant to Regulation 35(2) of the RoC, variance of the Chamber's deadline to submit all its documents on the Prosecution's LoE by 9 January 2013.
- (b) Pursuant to Articles 64(6)(d) and 69(3) of the Statute, authorisation to include 539 items listed in confidential Annex N to the Prosecution's LoE.
- (c) The shortening of the time frames for responses, as the Chamber sees fit.



Fatou Bensouda, Prosecutor

Dated this 30th day of October 2014

At The Hague, the Netherlands