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No.: ICC-01/09-01/11
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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
with Confidential Annexes A and B, and
Confidential, *EX PARTE*, Prosecution and VWU only Annexes C and D

Public redacted version of
Prosecution's tenth application pursuant to Regulation 35(2) of the
Regulations of the Court, 22 September 2014, ICC-01/09-01/11-1532-Conf

Source: Office of the Prosecutor

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

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Introduction

1. The Office of the Prosecutor (“OTP” or “Prosecution”) requests the authorisation of Trial Chamber V(A) (“Chamber”) to include 38 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 (“Statute”) (“Application”). The 38 items relate to witness [REDACTED] and consist of previously disclosed items of evidence such as screening notes, reports and other documents relating to this witness that were collected in the context of the Article 70 investigation throughout the course of 2013 and 2014, as well as the audio files of the witness’ 2012 interview with the Prosecution.

2. For the reasons more fully explained below, these items are now assessed to be relevant to the evidence of witness [REDACTED], a witness against whom a summons to appear has been issued.¹ [REDACTED] is scheduled to appear as the [REDACTED] witness in the September 2014 trial session² and a summons has been successfully served on him.³ The Prosecution has collected evidence relevant to [REDACTED] in the context of the Article 70 investigation and intends to lead [REDACTED] on this evidence, or alternatively, confront him with it during his examination. The bulk of the materials did not exist when the Prosecution filed its LoE and thus could not have been included therein.⁴ While the audio files of his 2012 interview did exist at the relevant time, the Chamber’s recent oral ruling⁵ has put the Prosecution on notice that it may need to use the audio files in addition to the verbatim transcripts that are included in the LoE when questioning the witness, and hence, the Prosecution seeks their inclusion too.

3. [REDACTED] has ceased cooperation with the Prosecution, recanted the statement he gave to the OTP and refused to testify voluntarily. The Prosecution

¹ ICC-01/09-01/11-1274-Corr2.

² ICC-01/09-01/11-1439-Conf, para. 6.

³ ICC-01/09-01/11-1480-Conf, ICC-01/09-01/11-1480-Conf-Exp-Anx7.

⁴ In addition to the interview audio files, only one item (the screening notes) existed prior to filing the LoE.

⁵ [REDACTED].

has reasonable grounds to believe that the withdrawal and recantation of this witness have been materially affected by improper interference. The Prosecution intends to use this evidence (a) to prove that [REDACTED] 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.

4. The Prosecution can also not rule out that [REDACTED] 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, the Prosecution notes that [REDACTED] has deposed to an affidavit withdrawing his cooperation and recanting his earlier statement, and levelled allegations of improper conduct against the OTP. In addition, the Prosecution also intends to use the evidence appended in Annexes B, C and D to support any application it may make for the admission of the prior statements of this and other witnesses.⁶
5. The Prosecution submits that the addition of these 38 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.⁷ All items previously disclosed as Rule 77 material or as potentially exonerating material were re-disclosed as incriminating evidence. 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 this witness and to ensure that the Chamber has before it necessary evidence for the determination of the truth. Further, as noted in the Chamber's "Decision on the Prosecution's Application for Addition of Documents to its List of Evidence",⁸ ("3 September 2014 Decision"), the addition of these items to the LoE is without

⁶ Under Rule 68(2) and/or Article 69.

⁷ See Annex A for details relating to the disclosure dates of all items in Annexes B, C and D.

⁸ ICC-01/09-01/11-1485-Conf.

prejudice to the Chamber's discretion to admit the said evidence in the record of the proceedings.⁹

Confidentiality

6. The Prosecution submits this Application and Annexes A and B as Confidential, as they contain personal and identifying information related to the witness which must remain concealed from the public. Annexes C and D are submitted as confidential *ex parte* as they contain full unredacted versions of the materials which are the subject of this Application. The Defence have access to all of these items *via* the Ringtail database. A public redacted version of this Application will also be filed.

Urgency

7. The Prosecution submits this filing in accordance with the Chamber's direction to file any such application by 16:00 on 22 September 2014.¹⁰ [REDACTED] is scheduled to appear on [REDACTED] September 2014.¹¹ Although it seems unlikely that his testimony will commence on that date given the delay occasioned by, *inter alia*, the late start of [REDACTED] testimony, the Prosecution respectfully requests that the period for the filing of responses be shortened to enable the request to be decided prior to the appearance of the witness.

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 2013.¹²

⁹ *Ibid.* at para.38.

¹⁰ ICC-01/09-01/11-1527-Conf.

¹¹ ICC-01/09-01/11-1442-Conf.

¹² ICC-01/09-01/11-440, para.13.

9. 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 [REDACTED] to appear as a witness in this case.¹³
 10. On 22 August 2014, the Prosecution filed a corrected version of its eighth application pursuant to Regulation 35(2) of the RoC.¹⁴ The Defence for Mr Ruto filed its Response on 27 August¹⁵ and the Defence for Mr Sang also filed a Response on 26 August,¹⁶ albeit out of time. With leave of the Chamber, the Prosecution filed further submissions on 28 August.¹⁷
 11. The Chamber issued its 3 September 2014 Decision, granting the Prosecution’s application to add documents related to P-0604 and P-0495 to its LoE.
 12. On 12 September 2014, the Prosecution filed an application to add documents related to P-0516 and P-0524 to its LoE.¹⁸
 13. On 19 September 2014, the Chamber granted the relief sought in the Prosecution’s 12 September application and issued a direction that the Prosecution file any application for addition of items to the LoE it considers necessary for witness [REDACTED] by no later than 16:00 on 22 September 2014.¹⁹
- [REDACTED]
14. [REDACTED]’s identity and statements were disclosed to the Defence on 9 January 2013.
 15. As the Prosecution informed the Chamber in its [REDACTED],²⁰ in the time leading up to his scheduled appearance at the seat of the Court, [REDACTED]

¹³ ICC-01/09-01/11-1274-Corr2.

¹⁴ ICC-01/09-01/11-1463-Conf-Corr.

¹⁵ ICC-01/09-01/11-1466-Conf.

¹⁶ ICC-01/09-01/11-1467-Conf.

¹⁷ ICC-01/09-01/11-1471-Conf.

¹⁸ ICC-01/09-01/11-1511-Conf.

¹⁹ ICC-01/09-01/11-1527-Conf.

²⁰ [REDACTED].

had remained in contact with the OTP and reiterated his willingness to testify. In the [REDACTED] months between his interview with the OTP in late June [REDACTED] and February [REDACTED] had reported no serious threats to his security²¹ and never indicated that there was any problem with the information he provided during his interview.²²

16. The OTP spoke to [REDACTED] on [REDACTED] February 2014, at which time he indicated he was en route [REDACTED] to travel to The Hague to testify. [REDACTED] failed to arrive at the rendezvous point and the OTP has been unable to communicate with or meet [REDACTED] since. At no time did [REDACTED] indicate to the Prosecution that he had received any inducements to provide false evidence against the Accused.
17. [REDACTED].²³ On the basis of information [REDACTED], the OTP contacted a lawyer who confirmed that [REDACTED] had requested him to prepare an affidavit to withdraw as a witness and that an affidavit had been drafted and signed by the witness. The lawyer emailed a copy of [REDACTED]'s affidavit to the Court on [REDACTED] 2014. In this affidavit, purportedly deposed to by [REDACTED], he recanted the statement he had previously given to the Prosecution, made accusations of improper inducements by [REDACTED] the OTP investigators who interviewed him, and withdrew his cooperation as a witness.²⁴

Submissions

Variation of the time and authorisation to disclose further evidence

18. 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

²¹ ICC-01/09-01/11-1188-Conf-Red, para.12.

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

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."

19. This Request 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 witness' withdrawal as a witness and potential hostility took place well after the 9 January 2013 deadline.
20. Although the OTP received a withdrawal affidavit from [REDACTED] in February 2014, it is only in light of the findings of the Article 70 investigation over the course of the last year, and pattern of witness interference and recantation that has emerged, that the Prosecution concluded that it may require the documents which are the subject of this Application when examining²⁵ this witness.

Relevance of additional items related to [REDACTED]

21. In its 3 September 2014 Decision, the Chamber noted that while the present case should focus on the guilt or innocence of the Accused and crimes with which they are charged, it was satisfied that in view of the allegations of interference, the addition of documents related to P-0604 and P-0495 had a "contextual or circumstantial bearing ... especially where the context or circumstances include the possibility that the witnesses may have recanted the statements previously given to the Prosecution" and that "some aspects of the Article 70 allegations are potentially relevant in the present case".²⁶

²⁵ Or cross examining, as the case may be.

²⁶ ICC-01/09-01/11-1485-Conf, paras.30, 36-37.

22. The Prosecution submits that the Chamber, in its quest for the determination of the truth, must have before it *all* relevant evidence. The Prosecution submits that the documents are relevant (a) to the issue of the witness' credibility and the reason for his withdrawal of cooperation and/or recantation; (b) for the purposes of cross-examination if the witness is 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 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 of these witnesses pursuant to Article 69 of the Statute and/or Rule 68 of the Rules of Procedure and Evidence.
23. The Prosecution requests permission to add to its LoE: (a) a screening note relating to [REDACTED],²⁷ (b) an affidavit purportedly from [REDACTED] withdrawing as an ICC witness,²⁸ (c) [REDACTED],²⁹ (d) five Investigator Reports,³⁰ and (e) the 28 audio files of its 2012 interview with the witness.³¹
24. [REDACTED] has been summoned to appear on [REDACTED] September 2014. As noted, on [REDACTED] 2014, the Prosecution received an affidavit purportedly deposed to by [REDACTED]. In it he recants his ICC statement and states that [REDACTED] identified him as a potential witness [REDACTED].³² He also claims that [REDACTED] promised to give him "financial assistance [REDACTED] and that members of the Prosecution promised "to pay [REDACTED] in exchange for false testimony implicating the Accused in this case.³³ These accusations against [REDACTED] the Prosecution are implausible

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

and transparently fabricated. The Prosecution submits the affidavit has evidently been procured through threats and/or bribes. The Prosecution seeks to include the affidavit and [REDACTED]³⁴ where the witness explains the reasons for his withdrawal on its LoE in order to confront the witness with the contents thereof, should he recant his earlier statements in evidence. Similarly, in such a scenario the audio files of his 2012 interview and the information he gave the Prosecution during his screening before being interviewed, may be necessary to confront the witness and to assess the veracity of this affidavit.

25. [REDACTED] was in regular contact with the Prosecution and repeatedly confirmed his willingness to testify over the course of 18 months and did not report any serious threats to his security.³⁵ The Investigator Reports appended in Annex C which are the subject of this Application³⁶ are useful contemporaneous records cataloguing the witness' interactions with the OTP and demonstrating the opportunities he had to 'come clean', if indeed he had been induced to provide false evidence.

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

26. The Prosecution submits that the addition of the 38 items is not prejudicial to the Accused for a number of reasons. Although the audio files of the witness' 2012 interview were only recently disclosed, the Defence has been in possession of the verbatim transcripts since January 2013. The remaining items were disclosed to the Defence with sufficient notice prior to [REDACTED]'s appearance at trial and when first disclosed, contained very few substantive redactions.³⁷
27. 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

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ *Ibid.*

³⁷ The Prosecution appends a table in Annex A which indicates when the items that the Prosecution seeks to add to its LoE were first disclosed to the Defence.

similar application in respect of the remaining summonsed witnesses at the earliest opportunity.³⁸

28. Additionally, as noted by the Chamber in its 3 September 2014 Decision, “adding items to the LoE is not the same as admitting those items into evidence, or even submitting them for admission into evidence”.³⁹ Whether the Prosecution is permitted to use these items, and if so, in what manner, will be determined at a later time.
29. The screening note, [REDACTED], the affidavit withdrawing as a witness and two of the Investigator Reports were previously disclosed (unredacted or with very minimal, standard redactions) to the Defence as potentially exonerating or Rule 77 material on or before 16 May 2014. The Prosecution re-disclosed these items as incriminating material on 9 September 2014. Two items (amounting to five pages) were disclosed for the first time on 9 September 2014.⁴⁰ None of these items brings new facts to the matters charged in the Prosecution’s Document Containing the Charges, but as outlined above, provide information with respect to the interference that the Prosecution contends [REDACTED] has been exposed to.
30. The audio files of [REDACTED]’s 2012 interview were provided for the first time on 19 September 2014,⁴¹ however the Defence teams have been in possession of the verbatim transcripts since January 2013. As noted above, the addition of the audio files to the LoE was deemed prudent in the event that the Chamber rules that it is necessary to use the recordings of his interview when questioning the witness, rather than the transcripts.

Relief requested

31. The Prosecution seeks the following relief:

³⁸ ICC-01/09-01/11-1463-Conf-Corr, fn.3.

³⁹ ICC-01/09-01/11-1485-Conf, para.38.

⁴⁰ See Annex A.

⁴¹ Courtesy copies on CD were provided on 19 September, in advance of formal disclosure on 22 September 2014.

- (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 38 items listed in confidential Annex A to the Prosecution's LoE.
- (c) The shortening of the time frames for responses, as the Chamber sees fit.



Fatou Bensouda, Prosecutor

Dated this 28th day of November 2014

At The Hague, the Netherlands